Due service and receipt of a copy of the within Brief for Respondent in Opposition to Petition for Writ of Certiorari is hereby admitted this .....day of November, 1939.

.....

U. S. WEBB,
Attorney General of the State of California.

.....

RALPH O. MARRON,
Deputy Attorney General.

.....

SEIBERT L. SEFTON,

Attorneys for Petitioner.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 430

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK, PETITIONER

vs.

MARIAN STEEDMAN WILSON, ROBERT GOSSETT, AND HARLEM G. RUBERT, AS EXECUTORS OF THE ESTATE OF RICHARD T. WILSON, JR., DECEASED

No. 431

MARIAN STEEDMAN WILSON, ROBERT GOSSETT, AND HARLEM G. RUBERT, AS EXECUTORS OF THE ESTATE OF RICHARD T. WILSON, JR., DECEASED, PETITIONERS

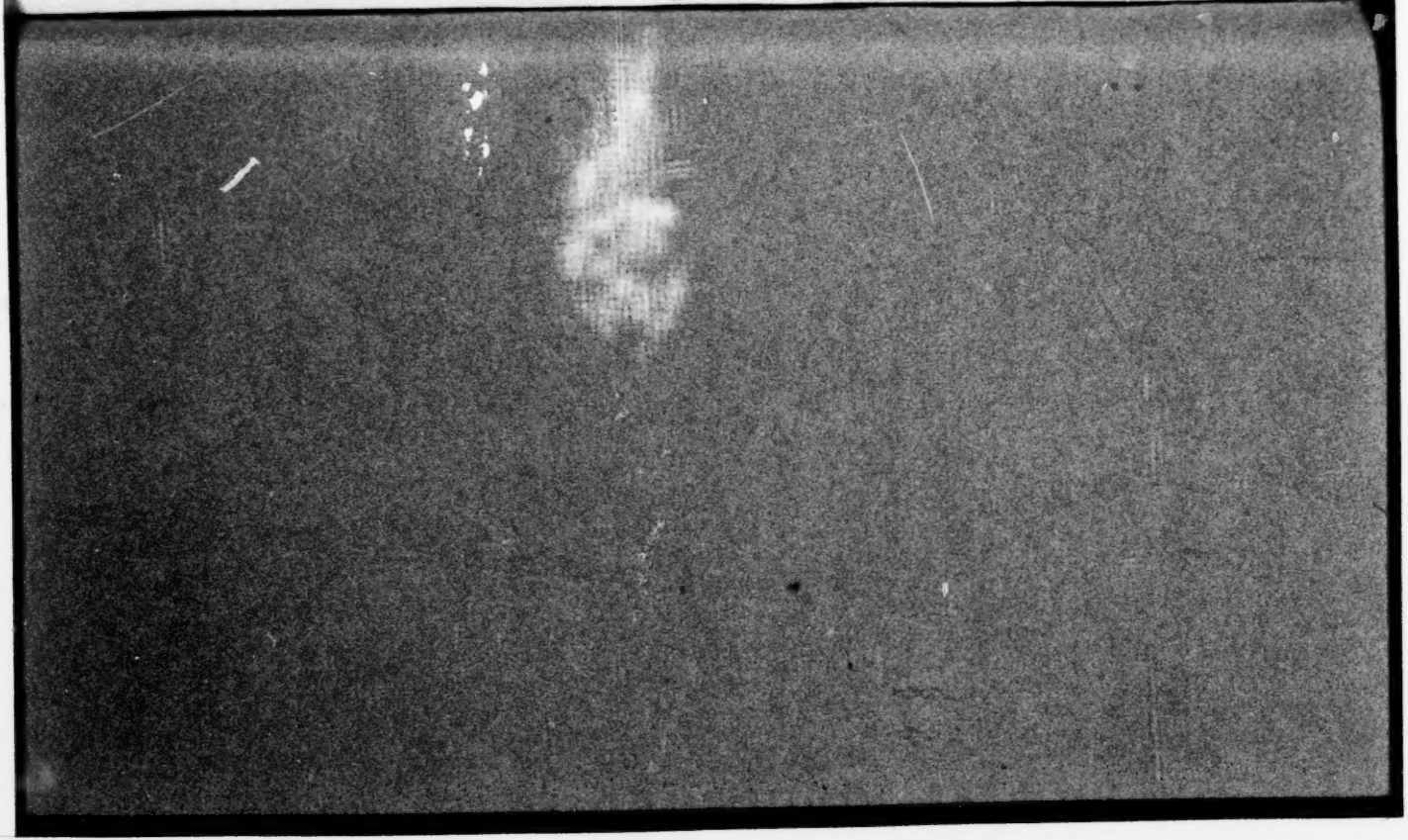
vs.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED OCTOBER 13, 1936.
CERTIORARI GRANTED NOVEMBER 16, 1936.

(37157, 37158)



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 460

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK, PETITIONER

vs.

MARIAN STEEDMAN WILSON, ROBERT GOELET, AND HARLEM G. RUBERT, AS EXECUTORS OF THE ESTATE OF RICHARD T. WILSON, JR., DECEASED

No. 461

MARIAN STEEDMAN WILSON, ROBERT GOELET, AND HARLEM G. RUBERT, AS EXECUTORS OF THE ESTATE OF RICHARD T. WILSON, JR., DECEASED, PETITIONERS

vs.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., second circuit	1	1
Statement under rule 13	1	1
Record from D. C. U. S., Southern New York	2	1
Order of substitution of executors	2	1
Summons	3	2
Complaint	5	2
Exhibit "A." Last will and testament of R. T. Wilson	11	5
Exhibit "B." Claim for refund	21	10

	Original	Print
Record from D. C. U. S., Southern New York—Continued.		
Answer	24	11
Bill of exceptions	27	12
Stipulation of facts	27	12
Exhibit "A." Last will and testament of R. T. Wilson	35	16
Exhibit "B." Claim for refund with attached memorandum	46	21
Supplemental stipulation of facts	57	26
Findings of fact and conclusions of law	59	27
Notice of exceptions	80	36
Defendants' notice of settlement of conclusions of law	83	38
Findings and conclusions	85	38
Stipulation and order settling bill of exceptions	89	40
Memorandum opinion, Coleman, J	90	40
Judgment	99	45
Petition for appeal and order of allowance	101	46
Assignment of errors	103	46
Citation [omitted in printing]	107	48
Stipulation as to record	108	48
Clerk's certificate [omitted in printing]	109	48
Opinion, Hand, J	110	49
Judgment	114	53
Clerk's certificate [omitted in printing]	116	53
Orders allowing certiorari	117, 118	54

1 In United States Circuit Court of Appeals
For the Second Circuit

L 41/136

MARIAN STEEDMAN WILSON, ROBERT GOELET, AND HARLEM G. RUBERT, as executors of the estate of Richard T. Wilson, deceased, plaintiffs-appellees

v.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of New York, defendant-appellant

Statement under rule 13

The above action was commenced on November 15, 1927.
Complaint was filed on November 17, 1927.
Answer was filed on March 14, 1928.
The case was submitted to the court on stipulated facts on December 16th, 1929.
Judgment was entered in favor of the plaintiff in the sum of $14,438.62, on June 9, 1931.
Appeal was taken to this court on the 28th day of August, 1931.

2 In United States District Court, Southern District of New York

L. 41–136

RICHARD T. WILSON, PLAINTIFF

against

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of the State of New York, defendant

Order of substitution of executors

January 21, 1930

On reading and filing the notice of motion of Marian Steedman Wilson, Robert Goelet, and Harlen G. Rubert, as executors of the last will and testament of Richard T. Wilson, deceased, plaintiff herein, dated January 16, 1930, and the affidavit of Harlen G. Rubert, sworn to January 15, 1930, and upon the pleadings and proceedings had in this action, now upon motion of Root, Clark, Buckner & Ballantine, attorneys for said executors, no one appearing in opposition, it is

3 Ordered that said motion be, and the same hereby is, granted and that Marian Steedman Wilson, Robert Goelet, and Harlen G. Rubert, as executors of the last will and testament of Richard T. Wilson, deceased, plaintiff herein, be substi-

tuted in the place of said Richard T. Wilson, and that said action be, and the same hereby is, continued in the name of said Marian Steedman Wilson, Robert Goelet, and Harlen G. Rubert as executors of the last will and testament of Richard T. Wilson, deceased, and that such substitution and continuance be without prejudice to any proceedings heretofore had in this action.

ALFRED C. COXE,
U. S. D. J.

In United States District Court

[Title omitted.]

Summons

To the above-named defendants:

You are hereby summoned to answer the complaint in this
4 action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable John C. Knox, judge of the District Court of the United States for the Southern District of New York, at the city of New York, this 15th day of November, A. D. 1927.

ALEX GILCHRIST, JR.,
Clerk.

ROOT, CLARK, BUCKNER, HOWLAND & BALLANTINE,
Plaintiff's Attorneys; Office and Post Office Address, 31 Nassau Street, Borough of Manhattan, city of New York.

5 In United States District Court

[Title omitted.]

Complaint

The plaintiff, above named, by Root, Clark, Buckner, Howland & Ballantine, his attorneys, complaining of the defendant herein, alleges as follows:

1. At all the times hereinafter mentioned the plaintiff was and now is a citizen of the State of New York, residing at No. 115 East 53rd Street, New York, New York, and having his principal place of business at No. 512 Fifth Avenue, New York, New York, which, after April 1, 1923, was in the third internal revenue district of the State of New York.

2. The defendant, Charles W. Anderson, on February 15, 1927, and at all times thereafter, was and now is the collector of internal

revenue for the third district of the State of New York and is a resident and inhabitant of the Southern District of New York.

6 3. This action is for the recovery of money paid by the plaintiff herein under protest, and unlawfully collected by the defendant as collector of internal revenue for the third district of the State of New York, as a Federal income tax upon the net income of the plaintiff for the calendar year 1922, and arises under sections 214 and 219 of the revenue act of 1921 (42 U. S. Statutes at Large 239, 246) and other acts of Congress.

4. On or about the 26th day of November, 1910, Richard T. Wilson, sr., died, leaving a last will and testament (a true copy of which is annexed to this complaint and marked Exhibit A and made a part hereof), dated May 3, 1905, and admitted to probate by the surrogate of New York County on December 13, 1910. By the terms of said last will and testament the executors were directed to set up certain trusts out of the decedent's estate and the residuary estate of the decedent, consisting largely of real estate and shares of manufacturing and business corporations, was left in equal shares to his five children, one of whom, Richard T. Wilson, is the plaintiff herein. In 1922 all of said five children were of full age and competent to manage their affairs.

5. At the time of his death said Richard T. Wilson, sr., was the owner of the real estate known as the Commercial Building, 384–6 Broadway, New York, New York. Prior to 1922 the executors of the estate of Richard T. Wilson, sr., had practically completed the administration of the estate, had set up out of the decedent's

7 personal estate all of the trusts provided for in paragraphs second, third, and fourth of the will, and prior to 1922 all of the assets of the decedent had been disposed of or distributed except the Commercial Building, 384–6 Broadway, New York, New York, and certain undeveloped real estate in Washington, D. C., known as Wilson Park. The said Commercial Building was not devised by the decedent to the executors as trustees and no trust was created with respect thereto, but said executors were given power to sell said Commercial Building and to hold and manage it until in their judgment it could be advantageously sold.

In 1922 and for a number of years prior thereto the executors distributed the entire net income of the estate received by them to the five residuary legatees and such income was reported by said residuary legatees as individuals for income tax purposes. In 1922 said executors, acting under the power of sale given them in the will, sold the Commercial Building, 384–6 Broadway, New York, New York, for $165,000. The fair market value of such property on March 1, 1913, and the fair market value of such property at the time of the death of Richard T. Wilson, sr., was $290,000. Such sale resulted in a loss of $125,000. The plaintiff, as one of the heirs and residuary legatees of Richard T. Wilson, sr., and the owner of an undivided one-fifth interest in said Commercial Building, was

entitled to deduct from his income for 1922 one-fifth of such loss, or $25,000. In the alternative, if the executors as fiduciaries are held to be the owners in trust of said Commercial Building and
8 entitled to deduct from the trust income the loss resulting from the sale of said property, the fiduciaries sustained a net loss for the year 1922 of $125,005.84, and the plaintiff, as the benecial owner of one-fifth of the assets held by the fiduciaries and the person entitled to the current distribution of one-fifth of the income and one-fifth of the proceeds of any sale of property received by the executors, was entitled to deduct from his income for 1922 one-fifth of said net loss, or $25,001.17. The additional income tax of $13,385.62 for 1922 wrongfully collected from the plaintiff, as hereinafter alleged, is due solely to the refusal to allow said deduction of $25,001.17.

6. By notice and demand, Charles W. Anderson, the defandant herein, as collector of internal revenue for the third district of the State of New York, notified the plaintiff of an additional assessment of income tax on the net income of the plaintiff for the calendar year 1922 in the amount of $13,385.62 and interest thereon amounting to $2,808.32, and demanded payment thereof on or before February 15, 1927.

7. On February 15, 1927, the plaintiff, under protest, paid the amount of said additional assessment of $13,385.62 and interest thereon of $2,808.32, to the defendant herein as collector of internal revenue for the third district of the State of New York. At the time said additional assessment with interest was paid, the whole amount of income tax legally due upon the net income of the plaintiff for the calendar year 1922 had already been paid and the
9 amount of said additional assessment and interest thereon was erroneously and illegally collected by the defendant herein.

8. Thereafter, on April 6, 1927, pursuant to section 3220 of the Revised Statutes as amended by the revenue acts of 1921, and pursuant to other acts of Congress and to rules of the Treasury Department in such cases made and provided, the plaintiff duly filed with said collector of internal revenue, on Form 843, a claim for refund of said additional tax and interest of $16,193.94, paid by the plaintiff under protest and illegally collected as aforesaid by the defendant herein. A copy of said claim for refund is hereto annexed and marked Exhibit B. Subsequently, on or about June 23, 1927, by letter dated June 23, 1927, and within two years prior to the commencement of this action, the Commissioner of Internal Revenue notified the plaintiff of the total disallowance of said claim for refund.

9. By reason of the illegality of the collection of said sum of $16,193.94, paid by the plaintiff under protest to the defendant as aforesaid, said defendant became indebted to the plaintiff in said sum for money had and received by said defendant to the use and for the benefit of the plaintiff. Said sum of $16,193.94 so received by the defendant, is still retained by him without legal right, and said

defendant has refused and still refuses to pay the same or any part thereof to the plaintiff, although payment thereof has been duly demanded, and said defendant is now indebted to the plaintiff in said sum of $16,193.94, with interest thereon from Feb-
10 ruary 15, 1927, for money had and received by said defendant to the use and for the benefit of the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for the sum of $16,193.94 with interest thereon from February 15, 1927, together with the costs and disbursements of this action.

ROOT, CLARK, BUCKNER, HOWLAND & BALLANTINE,
Attorneys for plaintiff, Office and post-office address, 31 Nassau Street, Borough of Manhattan, New York City.

[*Duly sworn to by Richard T. Wilson, jurat omitted in printing.*]

11 *Exhibit A to complaint*

LAST WILL AND TESTAMENT OF R. T. WILSON

Dated May 3, 1905. Probated December 3, 1910

I, Richard T. Wilson, do make, publish, and declare this to be my last will and testament:

First: I direct my just debts and funeral expenses to be promptly paid.

Second: I direct my executors hereinafter named to set apart out of my estate a fund of two hundred and fifty thousand dollars, which I given and bequeath to my wife, Melissa Clementine, for and during her lifetime; and upon her death I give and bequeath the same to my lineal descendants then living per stirpes and not per capita. I make no further provision for my wife for the reason that she is already otherwise amply provided for.

Third: I direct my executors to set apart out of my estate five separate sums or funds of five hundred thousand dollars each, which I give and bequeath to Union Trust Company of New York, in trust nevertheless, to invest and reinvest the same, to collect and receive the income thereof, and to pay over the net income of one of such funds to my son Marshall Orme Wilson during his
12 lifetime; the net income of another of such funds to my son Richard T. Wilson, jr., during his lifetime; the net income of another of such funds to my daughter Mary R. Goelet during her lifetime; the net income of another of such funds to my daughter Lelia Belle Herbert during her lifetime; and the net income of another of such funds to my daughter Grace G. Vanderbilt during her lifetime; and upon the death of each of my said sons and daughters I give and bequeath the principal of the fund then so held in trust for him or her to his or her lineal descendants then living per stirpes and not per capita, and in default of any such lineal descendant, to his or her brothers and sisters then living and the

lineal descendants then living of any thereof who may theretofore have died, per stirpes and not per capita.

Fourth: All the rest, residue, and remainder of my property, real, personal, and of every kind and description, which I shall own at the time of my death, I direct my executors hereinafter named to sell and convert into personalty, and to divide the proceeds thereof into five equal parts which I give and bequeath as follows:

(1) To my son Marshall Orme Wilson one of such parts to be his absolutely.

(2) To my daughter Mary R. Goelet one of such parts to be hers absolutely.

(3) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred
13 thousand dollars created in and by the foregoing third article of this will for the benefit of my son Richard T. Wilson, jr., and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said son Richard T. Wilson, jr., to be his absolutely.

(4) One of such parts to the amount of five hundred thousand dollars, I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Lelia Belle Herbert, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof as if a part of said original trust fund; and the balance of such part I give and bequeath to my said daughter Lelia Belle Herbert to be hers absolutely.

(5) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Grace G. Vanderbilt, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said daughter Grace G. Vanderbilt to be hers absolutely.

14 Fifth: I direct my executors hereinafter named in the administration of my estate to first constitute the funds mentioned in the foregoing second and third articles out of securities at their market value belonging to my estate, or the proceeds thereof, other than shares of any manufacturing or business corporation, or out of securities purchased by my executors for that purpose, at their cost; and such funds as so constituted shall be deemed to be the funds bequeathed in and by said second and third articles.

I direct my executors to next set apart out of my residuary personal estate, excepting the shares of any manufacturing or business

corporation, either in securities belonging thereto, at their market value, or the proceeds thereof or out of securities purchased by my executors for that purpose, at their cost, a sum sufficient to make the addition of five hundred thousand dollars to each of the trust funds for the benefit of my son Richard T. Wilson, jr., and my daughters Lelia Belle Herbert and Grace G. Vanderbilt provided for in subdivisions 3, 4 and 5 of the foregoing fourth article, and to pay to my son Marshall Orme Wilson and my daughter Mary R. Goelet each the sum of five hundred thousand dollars as part of their respective shares in my said residuary estate. Securities so set apart for this purpose shall be accepted by the trustees of the trusts and said individual legatees as a distribution of such portion of my residuary estate.

The judgment of my said executors as to what securities shall be set apart for the constitution of the various sums or funds hereinbefore in this article mentioned, and as to the market value thereof for such purpose, and as to what securities shall be purchased therefor, if any, shall be final and binding on all parties interested in my estate.

As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding, however, a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them, and I hereby authorize and empower my said executors within said period to sell, convey, assign, and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor.

I authorize and empower my said executors in their discretion, should they deem it a more advantageous method for the management and disposition of such portion of residuary estate, to cause to be organized a corporation under the laws of this or any other State, and to convey and transfer the same or any part thereof to such corporation, and receive in payment therefor the capital stock of said corporation; and to hold the said capital stock until it can in their judgment be advantageously disposed of, not exceeding, however, a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them; and to sell and dispose of the same, or any part thereof, at any time or from time to time during such period when they shall deem it most advantageous to the persons interested in my estate, and upon such terms, including the terms and mode of payment therefor, as they may deem proper.

Upon any sale or disposition being made by my said executors of such portion of my residuary estate, or of any part thereof, or of the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, I authorize and empower my said executors if the proceeds, or any part thereof, may in their judgment be distributed among the persons entitled thereto hereunder without any detriment to their interests to so distribute them forthwith; or in their discretion to retain the same, or any part thereof, for further conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them.

During the period that my said executors shall hold such portion of my residuary estate or the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, they shall semiannually pay over the net income thereof, or of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed in and by the foregoing fourth article in the proportion of their respective interests.

I further direct that the income from the fund set apart for the benefit of my wife pursuant to the foregoing second article
17 shall be paid to her by my said executors semiannually, and that during her lifetime they shall keep the same invested in such stocks, bonds, mortgages, or other securities as they may deem proper without regard to any limitations on investments by trustees.

I further authorize my said executors to vote in person or by proxy on the shares of stock of any corporation held by them as such executors at any meeting of the stockholders of such corporation or corporations; and with respect to the shares of stock, bonds, scrip, or other securities of any corporation which they at any time hold as such executors, including any corporation which they may cause to be incorporated as hereinbefore authorized, to consent to the merger, lease, consolidation or re-organization of such corporation or corporations, and to make any surrender, exchange or substitution of stock, bonds, scrip or other securities as an incident thereto; and to surrender or exchange the same for any shares of stock, bonds, scrip or other securities issued in lieu thereof, or to retire the same, under any plan or scheme other than a merger, lease, consolidation or re-organization; and generally to have and exercise as to all such matters the powers of an individual owner who is under no trust obligation.

Sixth: I authorize and empower Union Trust Company of New York as trustee of the trusts hereinbefore created, and its successor or successors in the trusts, to retain as proper investments any and all securities of which such trust estate may consist as constituted by my said executors: to invest and reinvest the funds of the
18 trust estates in real estate and in such stocks, bonds, and other securities as it or they may deem proper without reference to any limitations as to the kinds or classes of securities in which a trustee may invest trust funds; and I hereby confer upon it and

them, with respect to any shares of stock, bonds, scrip or other securities of any corporation which may at any time form a part of any of said trust estates, the same powers in the case of the merger, lease, consolidation, or re-organization of such corporation or corporations, or of any plan or scheme other than a merger, lease, consolidation or re-organization, as are hereinbefore conferred upon my executors under like circumstances.

I further direct that in case of securities passing to, taken or purchased at a premium by the said trustee, its successor or successors, it and they shall not be bound to set apart any portion of the income as a sinking fund to restore or absorb such premium.

I further direct that my interest in the firm of R. T. Wilson & Co., composed of myself and my sons Marshall Orme Wilson and Richard T. Wilson, Jr., at the time of my death shall be ascertained and determined as soon after my death as is consistent with a due regard to the best interests of my estate and said firm; and that the statements or accounts rendered by my sons as the surviving partners of said firm, showing fixing and determining such interest, and their payment or liquidation of the same out of the assets of the firm in cash or securities or both, when approved by their co-executor James M. Edwards, shall be binding and conclusive on all parties in-
19 terested in my estate notwithstanding the interest of my said sons in said firm and my estate and that they are executors of this will.

Seventh: I direct that any and all transfer, succession, or legacy taxes that may be levied on my estate, or become payable in respect of any interest passing under this will, including all such taxes upon interests for life or in remainder, be paid by my executors out of the principal of my residuary estate.

Eighth: The provision herein made for my wife is to be taken and received by her in lieu and bar of her dower and dower rights in any and all real estate wherever situated which I may own at the time of my death.

Ninth: I appoint my sons Marshall Orme Wilson and Richard T. Wilson, jr., and my friend James M. Edwards, of Morristown, New Jersey, executors of this my last will and testament. Upon the death of any of my said executors or of any of their successors appointed as herein provided, I appoint in his place and stead as an executor of this my will such person as may be designated by my surviving executors by a writing under their hands filed in the office of the surrogate's court where this will shall be probated, it being my intention that there shall always be three executors engaged in the administration of my estate. I direct that my said executors shall not be required to file an inventory of my estate, and that no bond or other security shall be required of them or either of them, or of said Union Trust Company of New York as trustee of the trusts under this will.

20 Tenth: I hereby revoke all former wills by me made.

In witness whereof I have hereunto set my hand and seal this 3rd day of May, in the year one thousand nine hundred and five.

RICHARD T. WILSON. [L. S.]

Signed, sealed, published, and declared by Richard T. Wilson, the testator above named, as and for his last will and testament in our presence, and we, at his request, and in his presence, and in the presence of each other have hereto subscribed our names as witnesses.

LEWIS CASS LEDYARD, Jr.,
2 East 87th Street, N. Y. City.

J. F. VAN NAME,
362 Evergreen Ave., Brooklyn, N. Y.

NORMAN L. ZENO,
148 Hancock St., Brooklyn, N. Y.

21 *Exhibit "B" to complaint*

(Execute separate form for each tax period)

Claim for abatement of tax assessed—Credit against outstanding Assessments—X Refund of taxes illegally collected—Refund of amounts paid for stamps used in error or excess.

TREASURY DEPARTMENT
Internal Revenue Service
Form 843—Jan. 1922
Comptroller General U. S.
January 18, 1922

IMPORTANT

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Collector's Notation
District
Account number
Date received
stamp here
Collector of Internal Revenue

Date received by
Administrative Unit.
stamp here

NOTICE TO COLLECTOR

Collector must indicate in block above the kind of claim, except in Income Tax cases.

STATE OF NEW YORK,
County of New York, ss:

RICHARD T. WILSON,
512 Fifth Avenue,
New York City.

This deponent, being duly sworn according to law, deposes
22 and says that this statement is made on behalf of the taxpayer

named, and that the facts given below with reference to said statement are true and complete:

	Period Year
	From: Jan. 1, 1922
	To: ——— 19—
1. Business in which engaged	
2. Character of assessment or tax: Personal income tax, Dec. 31, 1922.	
3. Amount of assessment	$13,385.62
4. Reduction of tax liability requested (income and profits tax)	$13,385.62
5. Amount to be abated	$———
6. Amount to be refunded (or such greater amount as is legally refundable)	$16,193.94
7. Dates of payment (see collector's receipts or indorsements of canceled checks): February 15, 1927, with interest.	
(If statement covers income tax liability, items 8–11, inclusive, must be answered.)	
8. District in which return (if any) was filed: New York second district.	
9. District in which unpaid assessment appears	
10. Amount of overpayment claimed as credit	$———
11. Unpaid assessment against which credit is asked; period from ——— to ———	$———

Deponent verily believes that this application should be allowed for the following reasons:

Memorandum attached.*

Signed: RICHARD T. WILSON.

Sworn to and subscribed before me
this 4 day of April, 1927.

NORMAN L. ZENO,
Notary Public, New York County, N. Y.

New York county clerk's No. 38.
New York register's No. 8043.
Term expires March 30, 1928.

24 In United States District Court

[Title omitted.]

Answer

The defendant for his answer to the complaint herein by Charles H. Tuttle, his attorney:

I. Answering paragraphs 1 and 4 denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the said paragraphs.

II. Answering paragraph 3 denies that the sum of $16,193.94 paid by the plaintiff to the defendant on account of the additional assessment of an income tax against the plaintiff was unlawfully collected by the defendant.

III. Answering paragraph 5 denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph except that he admits that the additional income tax of $13,385.62 collected by the defendant from the
25 plaintiff on or about February 15, 1927 on account of income taxes assessed against the plaintiff for the year 1922 repre-

* Printed at end of Stipulation of facts.

sents the amount due from the plaintiff as a result of the refusal of the United States Commissioner of Internal Revenue to allow a deduction in the amount of $25,001.17 claimed by the plaintiff in respect of his income for the year 1922.

IV. Answering paragraph 7 admits that the plaintiff paid to the defendant in respect of income taxes for the year 1922 on or about February 15, 1927, the amount of $13,385.62 and interest thereon in the amount of $2,808.32, but on information and belief denies each and every remaining allegation contained in said paragraph.

V. Answering paragraph 8 admits that on or about April 6, 1927, the plaintiff filed with the United States Commissioner of Internal Revenue a claim for the refund of the amount of $16,193.94 in respect of an additional assessment of income taxes paid by the plaintiff on or about February 15, 1927 and that the United States Commissioner of Internal Revenue rejected said claim in its entirety on or about June 23, 1927 but the defendant denies that said amount of $16,193.94 was illegally collected from the plaintiff.

VI. Answering paragraph 9 denies each and every allegation contained therein except that the amount of $16,193.94 was received by the defendant in respect of an additional assessment of income taxes against the plaintiff for the year 1922 and that the defendant has refused to pay said amount to the plaintiff although the same has been demanded.

26 Wherefore, the defendant demands judgment dismissing the complaint herein together with the costs and disbursements of this action.

CHARLES H. TUTTLE,

United States Attorney for the Southern District of New York, attorney for defendant, office & P. O. address, U. S. Courts & P. O. Bldg., Borough of Manhattan, city of New York.

[*Duly sworn to by Charles W. Anderson; jurat omitted in printing.*]

27 IN UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

[Title omitted.]

Defendant's bill of exceptions

STIPULATION OF FACTS

It is hereby stipulated between the parties to the above-entitled action that the following facts are true:

1. At all the times hereinafter mentioned the plaintiff was, and now is, a citizen of the State of New York, residing at No. 300 Park Avenue, New York, New York, and having his principal place of business at No. 512 Fifth Avenue, New York, New York, which,

after April 1, 1923, was in the third internal revenue district of the State of New York.

2. The defendant, Charles W. Anderson, on February 15, 1927, and at all times thereafter, was, and now is, the collector of internal revenue for the third district of the State of New York,
28 and is a resident and inhabitant of the Southern District of New York.

3. On November 26, 1910, Richard T. Wilson, sr., died, leaving a last will and testament (a true copy of which is annexed to this stipulation, marked "Exhibit A," and made a part thereof), dated May 3, 1905, and admitted to probate by the surrogate of New York County on December 13, 1910. Letters testamentary were duly granted to Marshall Orme Wilson, Richard T. Wilson, jr. (the plaintiff herein), and James M. Edwards, the executors named in the will, on December 13, 1910, and at all times thereafter until November, 1921, the said Marshall Orme Wilson, Richard T. Wilson, jr., and James M. Edwards were the duly qualified and acting executors under the will. In November, 1921, James M. Edwards died, and pursuant to the terms of the will, letters testamentary were granted to R. Thornton Wilson, a son of Marshall Orme Wilson, in the place and stead of James M. Edwards, and thereafter at all times herein mentioned the said Marshall Orme Wilson, Richard T. Wilson, jr. and R. Thornton Wilson were the duly qualified and acting executors under the will.

4. The five children of Richard T. Wilson, sr., namely, Marshall Orme Wilson, Mary R. Goelet, Grace T. Vanderbilt, Lelia Belle Herbert, and Richard T. Wilson, jr. (the plaintiff herein), named as distributees in said will, were all of full age and competent to manage their affairs at all times herein mentioned.

5. Melissa Clementine Wilson, wife of Richard T. Wilson,
29 sr., mentioned in paragraphs "second," "sixth" and "eighth" of the will, died on May 30, 1908, prior to the death of Richard T. Wilson, sr., and thereafter Richard T. Wilson, sr., was not married.

6. At the time of his death, said Richard T. Wilson, sr., was the owner of property in the State of New York having the following values:

Real estate	$2,216,083.33
Personal chattels	670,814.96
Corporate bonds and stocks	5,054,612.39
Interest in R. T. Wilson & Company, a partnership	8,838,658.10
Total	16,780,168.78

Included in the said real estate were the premises located at 384-6 Broadway, New York, New York, referred to herein as the "Commercial Building," a six-story office building, acquired by Richard T. Wilson, sr., at a cost of $210,000.00.

Richard T. Wilson, sr., was also the owner of certain real estate outside of the State of New York having a total value of approximately $100,000.

The total debts of the estate, including commissions to be paid the executors and attorneys fees to be paid, were as follows:

Funeral expenses	$2,910.17
Administration expenses	150,000.00
Debts of decedent	9,862.75
Commissions of executors	544,355.07
Total	707,127.99

30 7. In the years 1911 and 1912, the executors under the will of Richard T. Wilson, sr., created out of the personal property of the estate all of the trusts and additions thereto provided for in paragraphs "Third," "Fourth," and "Fifth" of the will.

8. Prior to 1922, the executors under the will of Richard T. Wilson, sr., had sold or disposed of real estate other than the said Commercial Building, in the following years and for the following contract prices:

1910 (real estate outside of New York)	$168.08
1911 (real estate outside of New York)	466.00
1912 (real estate outside of New York)	1,454.00
1913 (real estate outside of New York)	40,154.78
1914 (real estate outside of New York)	997.86
1914 (real estate in New York)	400,000.00
1915 (real estate outside of New York)	21,864.70
1915 (real estate in New York)	1,487,500.00
1916 (real estate in New York)	125,000.00
1919 (real estate outside of New York)	2,700.00
1919 (real estate in New York)	139,000.00
1920 (real estate outside of New York)	53,894.01
Total	2,373,099.43

31 9. Prior to and during the year 1922, the executors made the following total distributions to the five residuary legatees, including the plaintiff herein, in equal shares:

1912 cash and securities	$5,000,000.00
1913 cash	250,000.00
1914 cash and securities	1,150,000.00
1915 cash	700,000.00
1916 cash	5,450,000.00
1917 cash and securities	1,217,736.35
1919 cash and securities	68,238.65
1920 cash	50,000.00
1922 cash	50,000.00
Total	13,935,975.00

The said distributions included the entire net income of the estate for each year in which the distributions were made. The income so distributed was reported by the said residuary legatees, including the plaintiff herein, as individuals, for Federal tax purposes, for the year 1919 and each year thereafter. For the years 1916 and 1917 the Federal income tax was withheld by the estate and paid by it. No distribution was made in the year 1918 and the Federal income tax on the income of the estate was reported by the estate and the tax paid by the estate for that year.

Prior to 1922, pursuant to the terms of the will, all of the assets of the decedent not used in setting up said trust had been distributed

or disposed of and the proceeds distributed, except the said Commercial Building, certain undeveloped real estate in Wash-
32 ington, D. C., known as "Wilson Park," having a value of approximately $40,000, certain other real estate having a value of approximately $1,000, and certain personal property having a value of approximately $150,000. Prior to 1922, all of the debts of the decedent and of the estate, except current expenses, had been paid.

The executors did not form or cause to be formed the corporation mentioned in the fifth paragraph of the will.

The executors of the estate filed three intermediate accounts and orders of the surrogates' court of the county of New York settling such accounts were entered on or about April 20, 1917, April 8, 1919, and November 14, 1921, respectively. No other or further accounts have been filed by the executors.

10. In 1922, said executors, acting under the will, sold the said Commercial Building for $165,000. The fair market value of such property on March 1, 1913, and the fair market value of such property at the time of the death of said Richard T. Wilson, sr., was $290,000.00 The total allowable depreciation sustained on the said property between March 1, 1913, and the date of sale was $11,700.00. Such sale resulted in a loss of $113,300.00.

In 1922, the income and expenditures of the estate were reported as follows:

33

INCOME	
Interest from bank deposits, mortgages, etc	$10 825.78
Rent from Commercial Building	3,450.00
Loss on sale of Commercial Building	125,000.00
Loss on sale of stocks	4,673.75
Profit on sale of Florida lands	19.81
Dividends stock of foreign corporations	473.77
Refund of unexpired insurance premiums on Commercial Building	111.84
Total income (loss)	$114,792.55

DEDUCTIONS	
Taxes paid	$2,661.42
Commissions on sale of Commercial Building	1,646.17
Notary fees on sale of Commercial Building	30.70
Salaries and rent of office in connection with administering the estate	5,875.00
Total deductions	$10,213.29
Net income (loss)	$125,005.84

11. On or about March 14, 1923, the plaintiff, Richard T. Wilson, filed his individual Federal income tax return for the calendar year 1922, which return showed a net income of $85,312.19 and a tax of $23,423.06, all of which was duly paid. In reporting said
34 net income, one-fifth of the above loss, or $25,001.17, was deducted by the plaintiff from his gross income. It is agreed that if the plaintiff is entitled to the deduction claimed that the correct amount thereof is $22,660.00.

On or about January 29, 1927, the Commissioner of Internal Revenue made an additional assessment against the plaintiff in the amount of $13,385.62, for the calendar year 1922, all of which additional assessment was based solely on the disallowance of the deduction of said $25,001.17.

12. Thereafter, by notice and demand, Charles W. Anderson, the defendant herein, as collector of internal revenue for the third district of the State of New York, notified the plaintiff of said additional assessment of income tax for the calendar year 1922 in the amount of $13,385.62 and interest thereon amounting to $2,808.32, and demanded payment thereof on or before February 15, 1927.

On February 15, 1927, the plaintiff, under protest, paid the amount of said additional assessment of $13,385.62 and interest thereon of $2,808.32, making a total payment of $16,193.94, to the defendant herein as collector of internal revenue for the third district of the State of New York.

13. Thereafter, on April 6, 1927, the plaintiff duly filed with the said collector of internal revenue, on Form 8483, a claim for refund of said additional tax and interest, of $16,193.94. A copy of said
35 claim for refund is hereto attached, marked Exhibit B, and made a part thereof. On June 23, 1927, and within two years prior to the commencement of this action, the Commissioner of Internal Revenue notified the plaintiff of the total disallowance of said claim for refund.

ROOT, CLARK, BUCKNER, HOWLAND & BALLANTINE,
Attorneys for Plaintiff.

CHARLES H. TUTTLE,
Attorney for Defendant.
By EDWARD FELDMAN.

Exhibit "A" to stipulation

LAST WILL AND TESTAMENT OF R. T. WILSON

Dated May 3, 1905. Probated December 3, 1910

I, Richard T. Wilson, do make, publish, and declare this to be my last will and testament:

First: I direct my just debts and funeral expenses to be promptly paid.

Second: I direct my executors hereinafter named to set apart out of my estate a fund of two hundred and fifty thousand dollars,
36 which I give and bequeath to my wife Melissa Clementine for and during her lifetime; and upon her death I give and bequeath the same to my lineal descendants then living per stirpes and not per capita. I make no further provision for my wife for the reason that she is already otherwise amply provided for.

Third: I direct my executors to set apart out of my estate five separate sums or funds or five hundred thousand dollars each, which I give and bequeath to Union Trust Company of New York, in trust

nevertheless, to invest and reinvest the same, to collect and receive the income thereof, and to pay over the net income of one of such funds to my son Marshall Orme Wilson during his lifetime; the net income of another of such funds to my son Richard T. Wilson, jr., during his lifetime; the net income of another of such funds to my daughter Mary R. Goelet during her lifetime; the net income of another of such funds to my daughter Lelia Belle Herbert during her lifetime; and the net income of another of such funds to my daughter Grace G. Vanderbilt during her lifetime; and upon the death of each of my said sons and daughters I give and bequeath the principal of the fund then so held in trust for him or her to his or her lineal descendants then living per stirpes and not per capita, and in default of any such lineal descendant, to his or her brothers and sisters then living and the lineal descendants then living of any thereof who may theretofore have died, per stirpes and not per capita.

Fourth: All the rest, residue, and remainder of my prop-
37 erty, real, personal, and of every kind and description, which I shall own at the time of my death, I direct my executors hereinafter named to sell and convert into personalty, and to divide the proceeds thereof into five equal parts which I give and bequeath as follows:

(1) To my son Marshall Orme Wilson one of such parts to be his absolutely.

(2) To my daughter Mary R. Goelet one of such parts to be hers absolutely.

(3) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my son Richard T. Wilson, jr., and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said son Richard T. Wilson, jr., to be his absolutely.

(4) One of such parts to the amount of five hundred thousand dollars, I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Lelia Belle Herbert, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof as if a part of said original trust fund; and the balance of such
38 part I give and bequeath to my said daughter Lelia Belle Herbert to be hers absolutely.

(5) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Grace G. Vanderbilt, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if

a part of said original trust fund; and the balance of such part I give and bequeath to my said daughter Grace G. Vanderbilt to be hers absolutely.

Fifth: I direct my executors hereinafter named in the administration of my estate to first constitute the funds mentioned in the foregoing second and third articles out of securities at their market value belonging to my estate, or the proceeds thereof, other than shares of any manufacturing or business corporation, or out of securities purchased by my executors for that purpose, at their cost; and such funds as so constituted shall be deemed to be the funds bequeathed in and by said second and third articles.

I direct my executors to next set apart out of my residuary personal estate, excepting the shares of any manufacturing or business corporation, either in securities belonging thereto, at their market value, or the proceeds thereof or out of securities purchased by my executors for that purpose, at their cost, a sum sufficient to
39 make the addition of five hundred thousand dollars to each of the trust funds for the benefit of my son Richard T. Wilson, jr., and my daughters Lelia Belle Herbert and Grace G. Vanderbilt provided for in subdivisions 3, 4 and 5 of the foregoing fourth article, and to pay to my son Marshall Orme Wilson and my daughter Mary R. Goelet each the sum of five hundred thousand dollars as part of their respective shares in my said residuary estate. Securities so set apart for this purpose shall be accepted by the trustees of the trusts and said individual legatees as a distribution of such portion of my residuary estate.

The judgment of my said executors as to what securities shall be set apart for the constitution of the various sums or funds hereinbefore in this article mentioned, and as to the market value thereof for such purpose, and as to what securities shall be purchased therefor, if any, shall be final and binding on all parties interested in my estate.

As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding however a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them, and I hereby authorize and empower my said executors within said period, to sell, convey, assign and transfer the same or any part thereof, at such time or times as they may
40 deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor.

I authorize and empower my said executors in their discretion, should they deem it a more advantageous method for the management and disposition of such portion of residuary estate, to cause to be

organized a corporation under the laws of this or any other state, and to convey and transfer the same or any part thereof to such corporation, and receive in payment therefor the capital stock of said corporation; and to hold the said capital stock until it can in their judgment be advantageously disposed of, not exceeding, however a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them; and to sell and dispose of the same, or any part thereof, at any time or from time to time during such period when they shall deem it most advantageous to the persons interested in my estate, and upon such terms, including the terms and mode of payment therefor, as they may deem proper.

Upon any sale or disposition being made by my said executors of such portion of my residuary estate, or of any part thereof, or of the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, I authorize and empower my said executors if the proceeds, or any part thereof, may in their judgment be distributed among the persons entitled thereto here-
under without any detriment to their interests to so distribute
41 them forthwith; or in their discretion to retain the same, or any part thereof, for further conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them.

During the period that my said executors shall hold such portion of my residuary estate or the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, they shall semiannually pay over the net income thereof, or of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed in and by the foregoing fourth article in the proportion of their respective interests.

I further direct that the income from the fund set apart for the benefit of my wife pursuant to the foregoing second article shall be paid to her by my said executors semiannually, and that during her lifetime they shall keep the same invested in such stocks, bonds, mortgages, or other securities as they may deem proper without regard to any limitations on investments by trustees.

I further authorize my said executors to vote in person or by proxy on the shares of stock of any corporation held by them as such executors at any meeting of the stockholders of such corporation or corporations; and with respect to the shares of stock, bonds, scrip, or other securities of any corporation which they at any time hold as such executors, including any corporation which they may cause to be incorporated as hereinbefore authorized, to consent to the merger,
lease, consolidation, or reorganization of such corporation or
42 corporations, and to make any surrender, exchange, or substitution of stock, bonds, scrip, or other securities as incident thereto; and to surrender or exchange the same for any shares of stock, bonds, scrip, or other securities issued in lieu thereof, or to retire the same, under any plan or scheme other than a merger, lease,

conolidation, or reorganization; and generally to have and exercise as to all such matters the powers of an individual owner who is under no trust obligation.

Sixth: I authorize and empower Union Trust Company of New York as trustee of the trusts hereinbefore created, and its successor or successors in the trusts, to retain as proper investments any and all securities of which such trust estate may consist as constituted by my said executors; to invest and reinvest the funds of the trust estates in real estate and in such stocks, bonds, and other securities as it or they may deem proper without reference to any limitations as to the kinds or classes of securities in which a trustee may invest trust funds; and I hereby confer upon it and them, with respect to any shares of stock, bonds, scrip, or other securities of any corporation which may at any time form a part of any of said trust estates, the same powers in the case of the merger, lease, consolidation, or reorganization of such corporation or corporations, or of any plan or scheme other than a merger, lease, consolidation, or reorganization, as are hereinbefore conferred upon my executors under like circumstances.

43 I further direct that in case of securities passing to, taken or purchased at a premium by the said trustee, its successor or successors, it and they shall not be bound to set apart any portion of the income as a sinking fund to restore or absorb such premium.

I further direct that my interest in the firm of R. T. Wilson & Co., composed of myself and my sons, Marshall Orme Wilson and Richard T. Wilson, jr., at the time of my death shall be ascertained and determined as soon after my death as is consistent with a due regard to the best interests of my estate and said firm; and that the statements or accounts rendered by my sons as the surviving partners of said firm, showing, fixing, and determining such interest, and their payment or liquidation of the same out of the assets of the firm in cash or securities or both, when approved by their co-executor, James M. Edwards, shall be binding and conclusive on all parties interested in my estate, notwithstanding the interest of my said sons in said firm and my estate, and that they are executors of this will.

Seventh: I direct that any and all transfer, succession, or legacy taxes that may be levied on my estate, or become payable in respect of any interest passing under this will, including all such taxes upon interests for life or in remainder, be paid by my executors out of the principal of my residuary estate.

Eighth: The provision herein made for my wife is to be taken and received by her in lieu and bar of her dower and dower rights
44 in any and all real estate, wherever situated, which I may own at the time of my death.

Ninth: I appoint my sons, Marshall Orme Wilson and Richard T. Wilson, jr., and my friend, James M. Edwards, of Morristown, New Jersey, executors of this my last will and testament. Upon the death of any of my said executors or of any of their successors appointed

as herein provided, I appoint in his place and stead as an executor of this my will such person as may be designated by my surviving executors by a writing under their hands filed in the office of the surrogate's court where this will shall be probated; it being my intention that there shall always be three executors engaged in the administration of my estate. I direct that my said executors shall not be required to file an inventory of my estate, and that no bond or other security shall be required of them or either of them, or of said Union Trust Company of New York as trustee of the trusts under this will.

Tenth: I hereby revoke all former wills by me made.

In witness whereof I have hereunto set my hand and seal this 3rd day of May in the year one thousand nine hundred and five.

RICHARD T. WILSON. [L. S.]

45 Signed, sealed, published, and declared by Richard T. Wilson, the testator above named, as and for his last will and testament in our presence, and we, at his request, and in his presence, and in the presence of each other have hereto subscribed our names as witnesses.

LEWIS CASS LEDYARD, Jr.,
2 East 87th Street, N. Y. City.
J. F. VAN NAME,
362 Evergreen Ave., Brooklyn, N. Y.
NORMAN L. ZENO,
148 Hancock St., Brooklyn, N. Y.

46 *Exhibit "B" to stipulation*

(Execute separate form for each tax period)

Claim for abatement of tax assessed—Credit against outstanding assessments—X Refund of taxes illegally collected—Refund of amounts paid for stamps used in error or excess

TREASURY DEPARTMENT
Internal Revenue Service
Form 843—Jan. 1922
Comptroller General U. S.
January 18, 1922

Collector's Notation
District
Account number
Date received
stamp here
Collector of Internal Revenue

Date received by
Administrative Unit.
stamp here

STATE OF NEW YORK,
County of New York, ss:

RICHARD T. WILSON,
512 Fifth Avenue, New York City.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named,

and that the facts given below with reference to said statement are true and complete:

	Period	Year
	From	Jan. 1 1922
	To	----

1. Business in which engaged----------
2. Character of assessment or tax: Personal income tax Dec. 31, 1922.
3. Amount of assessment---------- $13,385.62
4. Reduction of tax liability requested (income and profits tax)-- $13,385.62
5. Amount to be abated---------- $
6. Amount to be refunded (or such greater amount as is legally refundable---------- $16,193.94
7. Dates of payment (see collector's receipts or indorsements of canceled checks) February 15, 1927, with interest. (If statement covers income-tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed: New York, second district.
9. District in which unpaid assessment appears----------
10. Amount of overpayment claimed as credit---------- $
11. Unpaid assessment against which credit is asked; period from ---------- to ---------- $

48 Deponent verily believes that this application should be allowed for the following reasons:

Memorandum attached.

Signed: RICHARD T. WILSON.

Sworn to and subscribed before me this 4th day of April, 1927.

NORMAN L. ZENO,
Notary Public, New York County, N. Y.

New York County clerk's No.
New York County register's No.

MEMORANDUM IN SUPPORT OF CLAIM FOR REFUND

The taxpayer, Richard T. Wilson, claims a refund of $16,193.94 and interest, the amount of an additional tax and interest thereon assessed by the Government on his 1922 personal income following a disallowance of a deduction of $25,001.17 disallowed by the Income Tax Unit on the ground that this loss was deductible only by the estate of R. T. Wilson, sr., deceased. The tax of $13,385.62 was paid under protest on February 15, 1927, together with $2,808.32 interest thereon, following demand by the Government. The $25,001.17 sought to be deducted from the personal income of the taxpayer was the loss resulting from the sale of an undivided one-

49 fifth interest in the Commercial Building, Nos. 384–386 Broadway, New York City, inherited by Richard T. Wilson the taxpayer, from R. T. Wilson, sr.

The grounds upon which the taxpayer bases his claim to a refund of the amount paid following disallowance of the deduction are as follows:

I. The loss resulted from the sale of inherited real estate, the legal title to which and the beneficial interest in which passed directly to the heirs and devisees of R. T. Wilson, sr., of whom Richard T. Wilson was one. The loss was therefore realized personally and directly by Richard T. Wilson.

II. Any trust which may have existed with respect to the real estate sold was a trust in which the five beneficiaries owned the corpus in equal shares, were entitled to take over the corpus at any time, were entitled to the periodic distribution of all the income, including gains realized from the sale of capital assets, and was therefore a trust under which the beneficiaries were entitled to have losses from the sale of capital assets treated as distributable to them and deductible in their personal income tax returns.

FACTS

Richard T. Wilson is the son of R. T. Wilson, sr. R. T. Wilson, sr., by will dated May 3, 1905, and admitted to probate December 13, 1910, left the bulk of his property in equal shares to his five children. By the will, the executors were given the power to hold the residuary estate, consisting largely of real estate and shares of corporate
50 stock, until an advantageous sale of such property could be made. Pending such sale, the income from the property was to be collected by the executors and paid semi-annually to the five children in equal shares. In case the executors made a sale of any property under the power of sale, the proceeds were to be distributed in equal shares to the five children, except that the executors were given discretion to hold such proceeds if they consisted of property rather than cash for the purpose of converting them into a form more suitable for distribution.

In 1922 the executors sold the Commercial Building, Nos. 384–386 Broadway, New York City, at a loss of $125,000. The other losses and expenses substantially equalled the other income, so that the estate showed a net loss of $125,005.84. Each of the five children deducted one-fifth of the net loss in his personal return. Since the net loss is attributable wholly to the loss on the sale of the Commercial Building, the status of that item settles the case.

I

The loss deducted resulted from the sale of inherited real estate, the legal title to which and the beneficial interest in which descended directly to the heirs and devisees, of whom Richard T. Wilson was one. This loss was therefore realized personally and directly by Richard T. Wilson.

The executors were trustees only of a power of sale. They
51 did not hold the real estate in trust. The legal title and the beneficial interest passed directly to the devisees on the death of the decedent. I. T. 1596 (June, 1923), p. 130; In re Walker's Estate (1913), 141 N. Y. S. 325; In re Roberts' Estate (1911), 132 N. Y. S. 396. That real estate passes directly to devisees is recognized by the Bureau of Internal Revenue.

Regulations 62, article 342;
Regulations 65, article 343.

And income from such real estate or profit from the sale of such real estate is taxable to the individual devisee, not to the executor of the decedent's estate.

Regulations 62, article 342;
Regulations 65, article 343;
A. R. M. 151 C. B., June, 1922, p. 214;
S. 1374, June, 1920, C. B., p. 96.

Therefore, it seems clear that loss resulting from the sale of such estate must be deductible from the income of the devisee individually, unless the will has the effect of devising such estate to the executors as trustees. That it does not have such effect is clear under New York statutes and decisions.

By its terms the will gave the executors a power of sale. A mere power of sale does not create a trust vesting legal title to real property subject to the power in the executors. Section 97 of the real property law provides:

"A devise of real property to an executor or other trustee,
52 for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be legal as a power and the real property shall descend to the heirs or pass to the devisees of the testator, subject to the execution of the power."

The will of R. T. Wilson, sr., here in question, provides that pending sale of such property, the executors may collect and pay over to the residuary legatees and devisees the net income from the property. It is established by New York decisions that where the main purpose of a will is the sale and distribution of the decedent's property, the existence of a power and direction to sell are for this purpose, and the existence of a power to collect rents and profits pending sale is incidental to the main purpose, and does not have the effect of creating a trust.

Heerman v. Burt (1879), 78 N. Y. 252, 266;
Henderson v. Henderson (1889), 113 N. Y. 110;
Brooklyn Trust Company v. Kiernan (1919), 108 Misc. 452. (Affirmed 191 App. Div. 895.)

The main purpose of the provisions in question in the will of R. T. Wilson, sr., clearly was the sale and distribution of the property. The right to delay the sale was given the executors merely
53 to allow them to await a favorable market, and during that delay they were to pay the income over to the devisees. The lack of any intention of the decedent to create a trust in the executors is evidenced by the fact that he expressly created such trusts as he wished and provided for designated trustees. This case seems clearly to fall within the well established principle in New York that in such a situation the executors hold merely a power of sale and no trust, and the legal title and beneficial ownership passed directly to the beneficiaries. The power of sale could have been terminated at any time by the devisees. Being of age and competent, they could have taken over or sold the real estate.

24 Corpus Juris, 164;
Hetzel v. Barber, 69 N. Y. 1;
Prentice v. Janssen, 179 N. Y. 478;
Mellen v. Mellen, 129 N. Y. 210, 220;
Trask v. Sturgis, 170 N. Y. 482, 497;
Brooklyn Trust Company v. Kiernan, supra.

Had they made a profit on the sale, each would have been taxable individually on such profit.

Regulations 62, article 342;
Regulations 65, article 343.

Therefore, there seems no doubt of their right to deduct the loss. The mere fact that the property was in fact sold for their benefit through the exercise of a power of sale (which they could have terminated) held by executors who did not hold the legal title to the property cannot change the result.

54 II

Any trust which may have existed with respect to the real estate sold was a trust in which the five beneficiaries owned the corpus in equal shares, were entitled to take over the corpus at any time, were entitled to the periodic distribution of all the income, including gains realized from the sale of capital assets, and was therefore a trust under which the beneficiaries were entitled to have losses from the sale of capital assets treated as distributable to them and deductible in their personal income tax returns.

Assuming, however, the existence of a trust in the executors for the benefit of the devisees, the trust is not a taxable entity. It is a trust under the terms of which all of the income was distributable periodically; the proceeds of any sale of capital assets were distributable; and the beneficiaries had the power to terminate it at any time and take over the corpus. Such a trust is analogous to and should be treated for tax purposes as having the same status as a partnership. It is a trust of the character described in paragraph 4 of subdivision (a) of section 219 of the revenue act of 1921—namely, a trust all of the income of which is periodically distributable and none of the income of which was accumulated for
55 future distribution. The regulations specifically say that such a trust is governed by regulations governing partnerships.

Regulations 62, article 345.

The regulation as to partnerships provides that losses from partnership operations are deductible from the individual income of the partners.

Regulations 62, article 332.

So the Treasury Department has properly concluded that, since partners are joint owners of the partnership property and are taxable individually for their share of partnership profits, they may deduct individually their share of partnership losses. Precisely the same state of facts exist in this case. The beneficiaries are joint

owners of the property; they are taxable on the profits therefrom, and should be allowed to deduct their losses.

Section 219 of the revenue act of 1921 does not contemplate the taxation of the fiduciaries or make the trust a taxable entity where all the income of a trust is distributable income. The beneficiaries are taxed on such income. While the statute is silent as to losses from a trust which is not a taxable entity, there is no intimation against and every reason for construing the general taxing plan to allow losses to be deducted from the income of the devisees whose income is taxed on profits coming from the same trust. This result was reached by the New York Court of Appeals in a case which arose on a question of a New York income tax. The taxpayer
56 deducted from her personal income tax a loss sustained in income from a trust of which she was sole beneficiary. The court held this deduction a proper one, although the New York law then in force, like the Federal revenue act of 1921 made no provision for the deduction by the beneficiary of the losses of a trust. The court pointed out that where income is distributable, the trust is not an entity; and said that in such a case the trust and the beneficiary are merged into one entity for tax purposes. It also relied on the strong analogy to the partnership situation, and held that the taxes paid on the trust real estate were properly deducted from the individual income of the beneficiary.

People ex rel. Field v. Gilchrist (1925), 240 N. Y. 301.

It is, therefore, respectfully submitted that if any trust of the real estate existed in this case, the trust was one under the terms of which all of the income was distributable periodically, the proceeds of any sale of capital assets were distributable, and the beneficiaries had the right at any time to terminate the trust and take over the c'rpus. The statute does not make such a trust a taxable entity, and such a trust is analogous to and should be treated on the same basis as a partnership for tax purposes. Under these circumstances, the individual beneficiaries, of whom Richard T. Wilson is one, are entitled under a proper construction and application of section 219 of the revenue act of 1921, to deduct their proportionate share of the losses in their individual income-tax returns.

57 Wherefore, the taxpayer asks a refund of the sum of $13,385.62 tax and $2,808.32 interest, paid under protest following demand by the Government after a disallowance of a reduction of $25,001.17 in the taxpayer's individual income for 1922, together with interest.

In United States District Court

[Title omitted.]

Supplemental stipulation of facts

It is hereby stipulated between the parties to the above-entitled action:

The action was originally brought in the name of Richard T. Wilson, plaintiff, against Charles W. Anderson, collector of
58 internal revenue for the third district of the State of New York, defendant. Subsequently, on December 29, 1929, and after the execution of the stipulation of facts upon which the case is submitted, Mr. Wilson died, and on January 21, 1930, the present plaintiffs were substituted.

It is further stipulated that the stipulation of facts in the action entitled Richard T. Wilson against Charles W. Anderson, collector of internal revenue for the third district of the State of New York, shall be considered the stipulation of facts for the present parties, and that wherever in said stipulation of facts the words "Richard T. Wilson, plaintiff," "Richard T. Wilson, jr.," or "the plaintiff," occur, they may be treated as referring to the testator of the present plaintiffs.

Dated this 18th day of February, 1930.

ROOT, CLARK, BUCKNER and BALLANTINE,
Attorneys for Plaintiffs.

CHARLES H. TUTTLE,
Attorney for Defendant.

59 In United States District Court

[Title omitted.]

Findings of fact and conclusions of law

May 29, 1931

This action having regularly come on for trial and been heard before Honorable Frank J. Coleman at a stated term of this court, and the plaintiffs having appeared by Messrs. Root, Clark, Buckner & Ballantine, and the defendant by Charles H. Tuttle, and the case having been heard upon a stipulation of facts, and due deliberation having been had, I find and decide as follows:

60 FINDINGS OF FACT

(1) This action was originally brought in the name of Richard T. Wilson, plaintiff, against Charles Anderson, collector of internal revenue for the third district of the State of New York, defendant. Subsequently, on December 29, 1929, Richard T. Wilson, the original plaintiff, died, and on January 21, 1930 the above named plaintiffs, as executors of the estate of Richard T. Wilson, deceased, were duly substituted as plaintiffs.

At all the times hereinafter mentioned prior to December 29, 1929, the plaintiffs' testator, Richard T. Wilson, jr., was a citizen of the State of New York, residing at No. 300 Park Avenue, New York, New York, and having his principal place of business at No. 512 Fifth Avenue, New York, New York, which, after April

1, 1923, was in the third internal revenue district of the State of New York.

(2) The defendant, Charles W. Anderson, on February 15, 1927, and at all times thereafter, was, and now is, the collector of internal revenue for the third district of the State of New York, and is a resident and inhabitant of the Southern District of New York.

(3) On November 26, 1910, Richard T. Wilson, sr., died, leaving a last will and testament dated May 3, 1905, and admitted to probate by the surrogate of New York County on December 13, 1910. The said will was as follows:

61 "I, Richard T. Wilson, do make, publish, and declare this to be my last will and testament:

First: I direct my just debts and funeral expenses to be promptly paid.

Second: I direct my executors hereinafter named to set apart out of my estate a fund of two hundred and fifty thousand dollars, which I give and bequeath to my wife Melissa Clementine for and during her lifetime; and upon her death I give and bequeath the same to my lineal descendants then living per stirpes and not per capita. I make no further provision for my wife for the reason that she is already otherwise amply provided for.

Third: I direct my executors to set apart out of my estate five separate sums or funds of five hundred thousand dollars each, which I give and bequeath to Union Trust Company of New York, in trust nevertheless, to invest and reinvest the same, to collect and receive the income thereof, and to pay over the net income of one of such funds to my son Marshall Orme Wilson during his lifetime; the net income of another of such funds to my son Richard T. Wilson, jr., during his lifetime; the net income of another of such funds to my daughter Mary R. Goelet during her lifetime; the net income of another of such funds to my daughter Lelia Belle Herbert during her lifetime; and the net income of another of such funds to

62 my daughter Grace G. Vanderbilt during her lifetime; and upon the death of each of my said sons and daughters I give and bequeath the principal of the fund then so held in trust for him or her to his or her lineal descendants then living per stirpes and not per capita, and in default of any such lineal descendants, to his or her brothers and sisters then living and the lineal descendants then living of any thereof who may theretofore have died, per stirpes and not per capita.

Fourth: All the rest, residue, and remainder of my property, real, personal, and of every kind and description, which I shall own at the time of my death, I direct my executors hereinafter named to sell and convert into personalty, and to divide the proceeds thereof into five equal parts which I give and bequeath as follows:

(1) To my son Marshall Orme Wilson one of such parts to be his absolutely.

(2) To my daughter Mary R. Goelet one of such parts to be hers absolutely.

(3) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my son Richard T. Wilson, jr., and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part
63 of said original trust fund; and the balance of such part I give and bequeath to my said son Richard T. Wilson, jr., to be his absolutely.

(4) One of such parts to the amount of five hundred thousand dollars, I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Lelia Belle Herbert, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof as if a part of said original trust fund; and the balance of such part I give and bequeath to my said daughter Lelia Belle Herbert to be hers absolutely.

(5) One of such parts to the amount of five hundred thousand dollars I direct to be added to the trust fund of five hundred thousand dollars created in and by the foregoing third article of this will for the benefit of my daughter Grace G. Vanderbilt, and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said daughter Grace G. Vanderbilt to be hers absolutely.

Fifth: I direct my executors hereinafter named in the administration of my estate to first constitute the funds mentioned in the
64 foregoing second and third articles out of securities at their market value belonging to my estate, or the proceeds thereof, other than shares of any manufacturing or business corporation, or out of securities purchased by my executors for that purpose, at their cost; and such funds as so constituted shall be deemed to be the funds bequeathed in and by said second and third articles.

I direct my executors to next set apart out of my residuary personal estate, excepting the shares of any manufacturing or business corporation, either in securities belonging thereto, at their market value, or the proceeds thereof or out of securities purchased by my executors for that purpose, at their cost, a sum sufficient to make the addition of five hundred thousand dollars to each of the trust funds for the benefit of my son Richard T. Wilson, jr., and my daughter Lelia Belle Herbert and Grace G. Vanderbilt provided for in subdivisions 3, 4, and 5 of the foregoing fourth article and to pay to my son Marshall Orme Wilson and my daughter Mary R.

Goelet each the sum of five hundred thousand dollars as part of their respective shares in my said residuary estate. Securities so set apart for this purpose shall be accepted by the trustees of the trusts and said individual legatees as a distribution of such portion of my residuary estate.

The judgment of my said executors as to what securities shall be set apart for the constitution of the various sums or funds
65 hereinbefore in this article mentioned, and as to the market value thereof for such purpose, and as to what securities shall be purchased therefor, if any, shall be final and binding on all parties interested in my estate.

As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until, in their judgment, it can from time to time be advantageously sold and disposed of, not exceeding however a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them, and I hereby authorize and empower my said executors within said period, to sell, convey, assign and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor.

I authorize and empower my said executors in their discretion, should they deem it a more advantageous method for the management and disposition of such portion of residuary estate, to cause to be organized a corporation under the laws of this or any other State, and to convey and transfer the same or any part thereof to such corporation, and receive in payment therefor the capital
66 stock of said corporation; and to hold the said capital stock until it can in their judgment be advantageously disposed of, not exceeding, however, a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them; and to sell and dispose of the same, or any part thereof, at any time or from time to time during such period when they shall deem it most advantageous to the persons interested in my estate, and upon such terms, including the terms and mode of payment therefor, as they may deem proper.

Upon any sale or disposition being made by my said executors of such portion of my residuary estate, or of any part thereof, or of the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, I authorize and empower my said executors if the proceeds, or any part thereof, may in their judgment be distributed among the persons entitled thereto hereunder without any detriment to their interests to so distribute them forthwith; or in their discretion to retain the same, or any part thereof for further

conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them.

During the period that my said executors shall hold such portion of my residuary estate or the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, they shall semiannually pay over the net income thereof, or
67 of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed in and by the foregoing fourth article in the proportion of their respective interests.

I further direct that the income from the fund set apart for the benefit of my wife pursuant to the foregoing second article shall be paid to her by my said executors semiannually, and that during her lifetime they shall keep the same invested in such stocks, bonds, mortgages or other securities as they may deem proper without regard to any limitations on investments by trustees.

I further authorize my said executors to vote in person or by proxy on the shares of stock of any corporation held by them as such executors at any meeting of the stockholders of such corporation or corporations; and with respect to the shares of stock, bonds, scrip or other securities of any corporation which they at any time hold as such executors, including any corporation which they may cause to be incorporated as hereinbefore authorized, to consent to the merger, lease, consolidation or reorganization of such corporation or corporations; and to make any surrender, exchange or substitution of stock, bonds, scrip or other securities as an incident thereto; and to surrender or exchange the same for any shares of stock, bonds, scrip or other securities issued in lieu thereof, or to retire the same, under any plan or scheme other than a merger, lease, consolidation or reorganization; and generally to have and
68 exercise as to all such matters the powers of an individual owner who is under no trust obligation.

Sixth. I authorize and empower Union Trust Company of New York as trustee of the trusts hereinbefore created, and its successor or successors in the trusts, to retain as proper investments any and all securities of which such trust estate may consist as constituted by my said executors; to invest and reinvest the funds of the trust estates in real estate and in such stocks, bonds and other securities as it or they may deem proper without reference to any limitations as to the kinds or classes of securities in which a trustee may invest trust funds; and I hereby confer upon it and them, with respect to any shares of stock, bonds, scrip or other securities of any corporation which may at any time form a part of any of said trust estate the same powers in the case of the merger, lease, consolidation, or reorganization of such corporation or corporations, or of any plan or scheme other than a merger, lease, consolidation or reorganization, as are hereinbefore conferred upon my executors under like circumstances.

I further direct that in case of securities passing to, taken or purchased at a premium by the said trustee, its successor or successors, it and they shall not be bound to set apart any portion of the income as a sinking fund to restore or absorb such premium.

69 I further direct that my interest in the firm of R. T. Wilson & Co., composed of myself and my sons Marshall Orme Wilson and Richard T. Wilson, jr., at the time of my death shall be ascertained and determined as soon after my death as is consistent with a due regard to the best interests of my estate and said firm; and that the statements or accounts rendered by my sons as the surviving partners of said firm, showing fixing and determining such interest, and their payment or liquidation of the same out of the assets of the firm in cash or securities or both, when approved by their coexecutor James M. Edwards, shall be binding and conclusive on all parties interested in my estate notwithstanding the interest of my said sons in said firm and my estate and that they are executors of this will.

Seventh: I direct that any and all transfer, succession, or legacy taxes that may be levied on my estate, or become payable in respect of any interest passing under this will, including all such taxes upon interest for life or in remainder, be paid by my executors out of the principal of my residuary estate.

Eighth: The provision herein made for my wife is to be taken and received by her in lieu and bar of her dower and dower rights in any and all real estate wherever situated which I may own at the time of my death.

70 Ninth: I appoint my sons Marshall Orme Wilson and Richard T. Wilson, jr., and my friend James M. Edwards, of Morristown, New Jersey, executors of this my last will and testament. Upon the death of any of my said executors or of any of their successors appointed as herein provided, I appoint in his place and stead as an executor of this my will such person as may be designated by my then surviving executors by a writing under their hands filed in the office of the surrogate's court where this will shall be probated; it being my intention that there shall always be three executors engaged in the administration of my estate. I direct that my said executors shall not be required to file an inventory of my estate, and that no bond or other security shall be required of them or either of them, or of said Union Trust Company of New York as trustee of the trusts under this will.

Tenth: I hereby revoke all former wills by me made.

In witness whereof I have hereunto set my hand and seal this 3rd day of May in the year one thousand nine hundred and five.

RICHARD T. WILSON. [L. S.]

71 Signed, sealed, published and declared by Richard T. Wilson, and testator above named, as and for his last will and testament in our presence, and we, at his request, and in his presence,

and in the presence of each other have hereto subscribed our names as witnesses.

LEWIS CASS LEDYARD, JR.,
2 East 87 Street, N. Y. City.
J. F. VAN NAME,
362 Evergreen Ave., Brooklyn, N. Y.
NORMAN L. ZENO,
148 Hancock St., Brooklyn, N. Y."

Letters testamentary were duly granted to Marshall Orme Wilson, Richard T. Wilson, jr. (the plaintiffs' testator herein), and James M. Edwards, the executors named in the will, on December 13, 1910, and at all times thereafter until November 1921, the said Marshall Orme Wilson, Richard T. Wilson, jr., and James M. Edwards were the duly qualified and acting executors under the will. In November, 1921, James M. Edwards died, and pursuant to the terms of the will, letters testamentary were granted to R. Thornton Wilson, a son of Marshall Orme Wilson, in the place and stead of James M. Edwards, and thereafter at all times herein mentioned prior to
72 the death of Richard T. Wilson, jr., on December 29, 1929, the said Marshall Orme Wilson, Richard T. Wilson, jr., and R. Thornton Wilson were the duly qualified and acting executors under the will.

(4) The five children of Richard T. Wilson, sr., namely, Marshall Orme Wilson, Mary R. Goelet, Grace T. Vanderbilt, Lelia Belle Herbert, and Richard T. Wilson, jr. (the plaintiffs' testator herein) named as distributees in said will, were all of full age and competent to manage their affairs at all times herein mentioned.

(5) Melissa Clementine Wilson, wife of Richard T. Wilson, sr., mentioned in paragraphs "second," "sixth," and "eighth" of the will, died on May 30, 1908, prior to the death of Richard T. Wilson, sr., and thereafter Richard T. Wilson, sr., was not married.

(6) At the time of his death, said Richard T. Wilson, sr., was the owner of property in the State of New York having the following values:

Real estate	$2,216,083.33
Personal Chattels	670,814.96
Corporate bonds and stocks	5,054,612.39
Interest in H. T. Wilson & Company, a partnership	8,838,658.10
Total	16,780,168.78

Included in the said real estate were the premises located at 384–6 Broadway, New York, New York, referred to herein as the
73 "Commercial Building," a six-story office building, acquired by Richard T. Wilson, sr., at a cost of $210,000.00.

Richard T. Wilson, sr., was also the owner of certain real estate outside of the State of New York having a total value of approximately $100,000.

The total debts of the estate, including commissions to be paid the executors and attorneys' fees to be paid, were as follows:

Funeral expenses	$2,910.17
Administration expenses	150,000.00
Debts of decedent	9,862.75
Commission of executors	544,355.07
Total	707,127.99

(7) In the years 1911 and 1912 the executors under the will of Richard T. Wilson, sr., created out of the personal property of the estate all of the trusts and additions thereto provided for in paragraphs "Third," "Fourth," and "Fifth" of the will.

(8) Prior to 1922 the executors under the will of Richard T. Wilson, sr., had sold or disposed of real estate other than the said Commercial building, in the following years and for the following contract prices:

74 1910 (real estate outside of New York)	$168.08
1911 (real estate outside of New York)	466.00
1912 (real estate outside of New York)	1,454.00
1913 (real estate outside of New York)	40,154.78
1914 (real estate outside of New York)	997.86
1914 (real estate in New York)	400,000.00
1915 (real estate outside of New York)	21,864.70
1915 (real estate in New York)	1,487,500.00
1916 (real estate in New York)	125,000.00
1919 (real estate outside of New York)	2,700.00
1919 (real estate in New York)	139,000.00
1920 (real estate in New York)	53,894.01
Total	2,373,099.43

(9) Prior to and during the year 1922 the executors made the following total distributions to the five residuary legatees, including the plaintiffs' testator herein, in equal shares:

75 1912 cash and securities	$5,000,000.00
1913 cash	250,000.00
1914 cash and securities	1,150,000.00
1915 cash	700,000.00
1916 cash	5,450,000.00
1917 cash and securities	1,217,736.35
1919 cash and securities	68,238.65
1920 cash	50,000.00
1922 cash	50,000.00
Total	13,935,975.00

The said distributions included the entire net income of the estate for each year in which the distributions were made. The income so distributed was reported by the said residuary legatees, including the plaintiffs' testator herein, as individuals, for Federal tax purposes, for the year 1919 and each year thereafter. For the years 1916 and 1917 the Federal income tax was withheld by the estate and paid by it. No distribution was made in the year 1918 and the Federal income tax on the income of the estate was reported by the estate and the tax paid by the estate for that year.

Prior to 1922, pursuant to the terms of the will, all of the assets of the decedent not used in setting up said trusts had been distributed or disposed of and the proceeds distributed, except the said Commercial Building, certain undeveloped real estate in Washington, D. C. known as "Wilson Park," having a value of approximately

$40,000, certain other real estate having a value of approximately $1,000, and certain personal property having a value of ap-
76 proximately $150,000. Prior to 1922, all of the debts of the decedent and of the estate, except current expenses, had been paid.

The executors did not form or cause to be formed the corporation mentioned in the fifth paragraph of the will.

The executors of the estate filed three intermediate accounts and orders of the surrogates' court of the county of New York settling such accounts were entered on or about April 20, 1917, April 8, 1919, and November 14, 1921, respectively. No other or further accounts have been filed by the executors.

(10) In 1922, said executors, acting under the will, sold the said Commercial Building for $165,000. The fair market value of such property on March 1, 1913, and the fair market value of such property at the time of the death of said Richard T. Wilson, sr., was $290,000.00. The total allowable depreciation sustained on the said property between March 1, 1913 and the date of sale was $11,700.00. Such sale resulted in a loss of $113,300.00.

In 1922, the income and expenditures of the estate were reported as follows:

77

INCOME

Interest from bank deposits, mortgages, etc	$10,825.78
Rent from Commercial Building	3,450.00
Loss on sale of Commercial Building	125,000.00
Loss on sale of stocks	4,673.75
Profit on sale of Florida lands	19.81
Dividends stock of foreign corporations	473.77
Refund of unexpired insurance premiums on Commercial Building	111.84
Total income (loss)	$114,792.55

DEDUCTIONS

Taxes paid	$2,661.42
Commissions on sale of Commercial Building	1,646.17
Notary fees on sale of Commercial Building	30.70
Salaries and rent of office in connection with administering the estate	5,875.00
Total deductions	$10,213.29
Net income (loss)	$125,005.84

(11) On or about March 14, 1923, the plaintiffs' testator, Richard T. Wilson, filed his individual Federal income tax return for
78 the calendar year 1922, which return showed a net income of $85,312.19 and a tax of $23,423.06, all of which was duly paid. In reporting said net income, one-fifth of the above loss, or $25,001.17, was deducted by the plaintiff from his gross income. It is agreed that if the plaintiff is entitled to the deductions claimed that the correct amount thereof is $22,660.00, and accordingly the amount to be recovered by the plaintiffs is $11,909.53, plus the amount of $2,499.03 interest paid thereon, totaling $14,408.63, together with interest on said total amount as provided by law.

On or about January 29, 1927, the Commissioner of Internal Revenue made an additional assessment against the plaintiff, in

the amount of $13,385.62, for the calendar year 1922, all of which additional assessment was based solely on the disallowance of the deduction of said $25,001.17.

(12) Thereafter, by notice and demand, Charles W. Anderson, the defendant herein, as collector of internal revenue for the third district of the State of New York, notified the plaintiff of said additional assessment of income tax for the calendar year 1922 in the amount of $13,385.62 and interest thereon amounting to $2,808.32, and demanded payment thereof on or before February 15, 1927.

On February 15, 1927, the plaintiff, under protest, paid the amount of said additional assessment of $13,385.62 and interest thereon of $2,808.32, making a total payment of $16,193.94, to the defendant herein as collector of internal revenue for the third district of the State of New York.

79 (13) Thereafter, on April 6, 1927, the plaintiff duly filed with the said collector of internal revenue, on Form 843, a claim for refund of said additional tax and interest in the sum of $16,193.94. On June 23, 1927, and within two years prior to the commencement of this action, the Commissioner of Internal Revenue notified the plaintiff of the total disallowance of said claim for refund.

And do further decide as

CONCLUSIONS OF LAW

1. The plaintiff's testator, Richard T. Wilson, jr., in computing his net income for the calendar year 1922 under the revenue act of 1921, was entitled to deduct from his gross income the amount of $22,660.00 as his proportionate part of the loss sustained on the sale of the Commercial Building.

2. The plaintiffs are entitled to judgment in the amount of fourteen thousand four hundred eight dollars and sixty-two cents ($14,408.62), together with interest thereon from February 15, 1927, as provided by law, with costs.

(Sgd.) FRANK J. COLEMAN,
U. S. D. J.

80 In the United States District Court

[Title omitted.]

Notice of exceptions

SIRS: Please take notice that Charles W. Anderson, the defendant herein, excepts to the decision of the court, filed in the above-entitled action on May 29, 1931, to the conclusions of law made by the court in the said decision, and to the refusal of the court to find conclusions of law as requested by the defendant, Charles W. Anderson, in the following particulars:

I. To the conclusion of law numbered and designated "1" upon the grounds that—

(a) The testator, Richard T. Wilson, sr., did not by his will expressly give his real property, including the Commercial
81 Building, to anyone, but imperatively directed his executors to sell it within two lives in being;

(b) By the will of the testator, Richard T. Wilson, sr., the executors named therein were empowered to collect the income and profits during the period they held and managed the real property, including the Commercial Building;

(c) The testator, Richard T. Wilson, sr., in his will intended that before distribution, his realty should be converted to personalty;

(d) The will of the testator, Richard T. Wilson, sr., created a residuary trust of his realty, including the Commercial Building, by virtue of the executors' control over the real property and the income therefrom, pending its sale and distribution, and said trust was valid under the New York real property law, section 96, subdivision 2, as one to sell for the benefit of legatees;

(e) The will of the testator, Richard T. Wilson, sr., created a valid residuary trust of his real property, including the Commercial Building, under the New York real property law, section 96, subdivision 3, for the receipt of the rents and profits of said real property, and the application of them to the use of specified legatees during their lives;

(f) Because of the existence of a valid trust of the real property, including the Commercial Building, of the testator, Richard T. Wilson, sr., under his will, the loss sustained upon the sale
82 of the Commercial Building in 1922 was not, in a proportionate amount, deductible from the gross income of the beneficiary, Richard T. Wilson, jr., under the internal revenue laws.

II. To the conclusion of law numbered and designated "2" upon the same grounds as those set forth in paragraph "1" herein.

To the refusal of the court to find as requested in the proposed conclusions of law submitted by the defendant, Charles W. Anderson as follows:

III. The defendant, Charles W. Anderson, excepts to the refusal of the court to make conclusions of law as requested in paragraphs "1," "2," "3," "4," "5," "6," "7," and "8" of the conclusions of law proposed and submitted by him to the court.

Dated, New York, June 2, 1931.

GEORGE Z. MEDALIE.

United States Attorney, Southern District of New York, Attorney for Defendant; office and P. O. address, Old Post Office Building, Borough of Manhattan, city of New York.

To:

ROOT, CLARK & BUCKNER, Esqs.,
Attorneys for Plaintiffs, 31 Nassau Street, Borough of Manhattan, New York City.

83 In United States District Court

[Title omitted.]

Defendant's notice of settlement of conclusions of law

SIRS: Please take notice that proposed conclusions of law of which the annexed is a copy will be presented for settlement to the Honorable Frank J. Coleman, United States District Judge for the Southern District of New York, at the office of the clerk of the District Court, Southern District of New York, at the old Post Office Building, Borough of Manhattan, city of New
84 York, on the 29th day of May, 1931, at 10.30 o'clock in the forenoon of that day.

Dated, New York City, May 28, 1931.

GEORGE Z. MEDALIE,

United States Attorney, Southern District of New York, Attorney for Defendant; office and post office address, Old Post Office Building, Borough of Manhattan, New York City.

To:

ROOT, CLARK & BUCKNER, Esqs.,
Attorneys for Plaintiffs, 31 Nassau Street, Borough of Manhattan, New York City.

85 At a stated term of the United States District Court, held in and for the Southern District of New York, at the Old Post Office Building, in the Borough of Manhattan, city of New York, on the day of , 1931

Present: Honorable Frank J. Coleman, United States district judge.

L 41/136

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEN G. RUBERT, as executors of the Estate of Richard T. Wilson, deceased, plaintiffs

against

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of New York, defendant

This action having regularly come on for trial and having been heard before Honorable Frank J. Coleman, United States district judge, at a stated term of this court, and the plaintiffs having appeared by Root, Clark, Buckner & Ballantine, Esqs., their attorneys, and the defendant having appeared by Honorable Charles H. Tuttle, then United States attorney for the Southern District
86 of New York, and now appearing by Honorable George Z. Medalie, United States attorney for the Southern District

of New York, and the case having been heard upon a stipulation of facts, and no objection having been made to the findings of fact proposed by the attorneys for the plaintiffs, and the plaintiffs having submitted proposed conclusions of law to which the defendant objects, and the defendant having submitted proposed conclusions of law, and due deliberation having been had, I find and decide as follows:

FINDINGS OF FACT

I find the facts as submitted in the plaintiffs' proposed findings of fact under their notice of settlement of said findings of fact, dated New York, May 26, 1931.

And do further decide as

CONCLUSIONS OF LAW

1. The testator, Richard T. Wilson, sr., did not by his will expressly give his real property, including the Commercial Building, to anyone, but imperatively directed his executors to sell it within two lives in being.

2. By the will of the testator, Richard T. Wilson, sr., the executors named therein were empowered to collect the income and profits during the period they held and managed the real property, including the Commercial Building.

87 3. The testator, Richard T. Wilson, sr., in his will intended that before distribution his realty should be converted to personalty.

4. The will of the testator, Richard T. Wilson, sr., created a residuary trust of his realty, including the Commercial Building, by virtue of the executors' control over the real property and the income therefrom, pending its sale and distribution, and said trust was valid under the New York real property law, section 96, subdivision 2, as one to sell for the benefit of legatees.

5. The will of the testator, Richard T. Wilson, sr., created a valid residuary trust of his real property, including the Commercial Building, under the New York real property law, section 96, subdivision 3, for the receipt of the rents and profits of said real property, and the application of them to the use of specified legatees during their lives.

6. Because of the existence of a valid trust of the real property, including the Commercial Building, of the testator, Richard T. Wilson, sr., under his will, the loss sustained upon the sale of the Commercial Building in 1922 was not, in a proportionate amount, deductible from the gross income of the beneficiary, Richard T. Wilson, jr.

7. The plaintiffs' testator, Richard T. Wilson, jr., in computing his net income for the calendar year 1922 under the revenue act of 1921, was not entitled to deduct from his gross income the

88 amount of $22,660 as his proportionate part of the loss sustained in the sale of the Commercial Building by the executors of Richard T. Wilson, sr., in 1922.

8. The defendant is entitled to judgment dismissing the complaint on the merits, together with costs.

Refused 5/29/31. F. J. C.

_____,
U. S. D. J.

Plaintiffs' exceptions to the above conclusions of law noted and allowed.

_____.
U. S. D. J.

89 In United States District Court

[Title omitted.]

Stipulation and order settling bill of exceptions

It is hereby stipulated and agreed that the foregoing contains all of the testimony, exhibits, facts stipulated, findings of fact and conclusions of law made by the court, proposed conclusions of law submitted by the defendant, and exceptions made at the trial of and filed in this case, and that the same may be settled and ordered on file as the bill of exceptions herein.

Dated, New York, December 18th, 1931.

ROOT, CLARK & BUCKNER,
Attorneys for Plaintiffs.
GEORGE Z. MEDALIE,
United States Attorney, Attorney for Defendant.

90 Upon the foregoing stipulation, it is ordered that the foregoing may be and hereby is settled and ordered on file as the bill of exceptions herein.

Dated, New York, December 18th, 1931.

FRANK J. COLEMAN,
U. S. D. J.

In United States District Court, Southern District of New York

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEN G. RUBERT, executors of the estate of Richard T. Wilson, deceased, plaintiffs

against

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE third district of New York, defendant

Memorandum opinion

At law. Action tried upon stipulation of facts without jury to recover an additional income tax of $11,909.59 and interest, paid by Richard T. Wilson, jr., the plaintiffs' testator for the year 1922.

91 Root, Clark, Buckner & Ballentine (George E. Cleary; Clark T. Brown, of counsel), attorneys for the plaintiffs.

Robert E. Manley (W. H. Schulman, of counsel), acting United States attorney.

F. J. Coleman, J.

MEMORANDUM

Richard T. Wilson, sr., died on November 26, 1910, leaving as part of his residuary estate the Commercial Building in New York City, having a value at that time of $290,000. His son, Richard T. Wilson, jr., who is the plaintiffs' testator, was one of the residuary legatees, and when the Commercial Building was sold in 1922 by the executors of the father's estate at a loss of $113,305.84, Richard T. Wilson, jr., deducted his proportionate part of the loss, which is now conceded to be $22,660, from his total income reported for that year. The Commissioner of Internal Revenue disallowed the deduction and assessed an additional tax on account of it, which was paid under protest and is now sought to be recovered. If the deduction was proper, it is conceded plaintiff is entitled to recover $11,909.59, and $2,499.03 interest paid, together with interest on both amounts, as provided by law.

The question presented is whether the residuary legatees under the father's will had the right to deduct from their individual incomes the loss sustained in the sale of the Commercial Building, or whether the deduction could only be made from the total
92 income reported by the father's executors. Concededly, the residuary legatees had the right to do so if the property was left to them directly and they became the holders of the legal title; subject to a mere power of sale in the executors; but the Government contends that the property was given to the persons named as executors in trust for the residuary legatees. The plaintiffs deny that there was any trust, and contend that even if there were one, its terms were such that the legatees became immediately entitled to the income and proceeds from the property, and so had the right to deduct the loss in their individual returns.

The first problem is the construction of the father's will to determine whether the residuary estate was left in trust, and if so, upon what terms. He left a net estate of approximately $16,000,000 consisting of various parcels of real estate valued at about $2,300,000 and personally worth about $14,000,000. His general plan was to set up spendthrift trusts for each of his five children in the amount of $500,000 in some instances and of $1,000,000 in others, and to divide the residuum of the estate among them. He made a direct and express bequest of the trust funds to a named trustee, which was not one of the executors, and specified the terms of the trust, but as to the residuum he used the following words:

"All the rest, residue, and remainder of my property, real, personal, and of every kind and description, which I shall own at the

time of my death, I direct my executors hereinafter named to
93 sell and convert into personalty, and to divide the proceeds thereof into five equal parts, which I give and bequeath as follows:

"(1) To my son Marshall Orme Wilson one of such parts to be his aboslutely.

"(2) To my daughter, Mary R. Goelet, one of such parts to be hers absolutely.

"(3) One of such parts to the amount of $500,000 I direct to be added to the trust fund of $500,000 created in and by the foregoing third article of this will for the benefit of my son, Richard T. Wilson, jr., and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said son, Richard T. Wilson, jr., to be his absolutely."

Provisions similar to that for Richard T. Wilson, jr., were made for the remaining two children.

The testator was concerned about the nature of his property, which consisted of real estate and of the stock of manufacturing and business corporations. He desired to provide not only for its division among his children, but also for protection against its loss of value after his death. He, accordingly, directed that the spendthrift trusts be constituted out of securities which were not the stock of business or manufacturing corporations and provided:

94 "As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding however a period longer than the lives of my sons, Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them, and I hereby authorized and empower my said executors within said period, to sell, convey, assign and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor."

Furthermore, in regard to this balance of the residuum he authorized the executors in their discretion to organize a holding corporation and to retain its stock until in the judgment of the executors it could be advantageously disposed of, but not longer than the two specified lives in being. The executors, however, never organized such corporation.

The only other provisions which need be considered in detail read as follows:

"Upon any sale or disposition being made by my said
95 executors of such portion of my residuary estate, or of any part thereof, or of the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, I authorize and empower my said executors if the proceeds, or any part thereof, may in their judgment be distributed among the persons entitled thereto hereunder without any detriment to their interests to so distribute them forthwith; or in their discretion to retain the same, or any part thereof, for further conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them.

"During the period that my said executors shall hold such portion of my residuary estate or the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, they shall semiannually pay over the net income thereof, or of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed in and by the foregoing fourth article in the proportion of their respective interests."

Three executors were appointed, including two of the residuary legatees, and they were given power to vote all stock "held by them as such executors * * *; and generally to have and exercise as to all such matters the power of an individual owner who is under no trust obligation."

It thus appears that the testator did not expressly give the real propery to anyone, but imperatively directed his executors to
96 sell it within two lives in being. He did, however, make a present gift of the proceeds to his five children "absolutely." Pending the sale, which might in the discretion of the executors be long deferred (it was twelve years in the case of the Commercial Building) the executors were directed to "hold and manage" the property and to "semiannually pay over the net income thereof" to the children. While there was no express provision to that effect, it must be held that the executors were empowered to collect the income and profits during the period they held and managed the property. Upon a sale they were authorized to distribute the proceeds forthwith or in their discretion to retain them "for further conversion before distribution," but not beyond the two lives, in the meanwhile distributing the net income from such proceeds semiannually.

It is clear that the testator did not have the specific idea of a trust in mind when making the provisions for his residuary estate. Even if the legal effect of those provisions was to create a trust, it is manifest that the testator did not in his own mind apply that name to the result. The will does create trusts in the usual form by expressly giving the trust funds to the trusts upon specified conditions; but in regard to the residuary the only words of gift are of the proceeds to the children "absolutely," and the persons named as executors are never referred to as trustees.

It remains therefore to be determined whether the provisions necessitate a ruling that a trust of the residuary estate was created
97 contrary to the testator's classification. It must be recognized that he had no desire to postpone the distribution of his residuary estate nor his children's absolute dominion over it. He intended that before distribution his realty should be converted to personalty, and, probably, that his stock of manufacturing and business corporations be turned into less speculative investments; and his purpose in making the various provisions which cause the present doubt was merely to give the executors such powers in the conversion and distribution that a sacrifice of value might be avoided, and to provide for the distribution of the income pending the distribution of the corpus. Defendant emphasizes the provision that the executors may retain the proceeds of any sale if in their judgment an immediate distribution would not be for the best interests of the legatees; but that retention was limited to the purpose of "further conversion before distribution."

I feel constrained to hold that the will created a residuary trust, whatever the testator's idea of the nomenclature may have been, because of the executor's control over the property and the income therefrom pending its sale and distribution; and that as to the real estate, the trust was valid under the New York real property law, section 96, subdivision 2, as one to sell for the benefit of legatees. It is impossible for me to see any essential difference between the present case and Morse v. Morse, 85 N. Y. 53, which apparently has never been overruled or criticized and which establishes the law of New York upon the point.

Notwithstanding the existence of the trust, I believe the loss
98 was deductible from the gross income of the beneficiaries. While it is true that under the federal statutes and regulations a trust estate and its beneficiaries are to some extent separate tax entities, in the present case the beneficiaries had so immediate an interest in the trust property that a loss of the latter may properly be held to have been suffered by them. They were the beneficial owners not only of the income, but of the corpus and that ownership was unqualified and "absolute." They were entitled to a practically immediate distribution not only of the income, but of the proceeds of the sale of the real property subject only to the right of the executors to reserve such part of the proceeds as they thought should be further converted before distribution. Under the revenue act of 1921, section 219, the income was chargeable to the beneficiaries and the tax thereon payable by them even if there had been no distribution of it, because under the terms of the will the beneficiaries were entitled to a distribution. It is difficult to see why that principle should not apply to capital gains and losses where the same beneficiaries are entitled to a distribution of the corpus.

While the facts in Merle-Smith v. Commissioner, 42 Fed. 2d 837, are dissimilar to those of the present case, I think the sentiments therein expressed are applicable. The plaintiff here has real interest

in the corpus and possesses every important attribute of ownership to even greater extent than the petition in that case. Monger v. Commissioner, 16 B. T. A. 167 and People ex rel. Field v. Gilchrist, 240 N. Y. 301, also tend to support this ruling. See, however,
99 Kleins Federal Income Taxation, p. 1169 and its 1931 Supplement, p. 307. Judgment is accordingly directed for the plaintiffs in the sum of $14,408.62 with interest as provided by law and costs.

Settle findings on notice.

March 19, 1931.

U. S. D. J.

In United States District Court, Southern District of New York

L 41/136

Marian Steedman Wilson, Robert Goelet and Harlen G. Rubert, as executors of the estate of Richard T. Wilson, deceased, plaintiffs

against

Charles W. Anderson, Collector of Internal Revenue for the Third District of New York, defendant

Judgment

The issues in this action having been duly brought on for trial before Honorable Frank J. Coleman, district judge, and the action tried upon a stipulation of facts without a jury, a jury
100 having been duly waived, at a term of this court held at the courthouse in and for the southern district of New York, and the plaintiffs having appeared by Messrs. Root, Clark, Buckner & Ballantine, and the defendant by Charles H. Tuttle, Esq., United States district attorney, and the issues having been duly tried, and the court having directed judgment for the plaintiffs in the sum of fourteen thousand four hundred eight dollars and sixty-two cents ($14,408.62), plus interest from February 15, 1927, and costs, and a decision having been duly filed herein, and an order for judgment having been duly filed herein on June 5th, 1931, it is

Adjudged and decreed, that the plaintiffs, Marian Steedman Wilson, Robert Goelet, and Harlem C. Rubert, as executors of the estate of Richard T. Wilson, deceased, recover of the defendant, Charles W. Anderson, collector of internal revenue for the third district of New York, the sum of fourteen thousand four hundred eight dollars and sixty-two cents ($14,408.62), with interest thereon according to law, and the plaintiffs' costs which have been taxed at $30, and that the plaintiffs have execution therefor.

Judgment entered this 9th day of June, 1931.

CHARLES WEISER,
Clerk, U. S. D. C., S. D. N. Y.

101 In United States District Court

[Title omitted.]

Petition for appeal and order of allowance

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Charles W. Anderson, the above-named defendant, feeling himself aggrieved by a judgment made and entered herein on the 9th day of June, 1931, in the sum of $14,408.62, with interest according to law, plus $30 costs as taxed, in favor of the above-named plaintiffs, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays for an order allowing petitioner to prosecute said appeal, and that a transcript of record, papers, and proceedings
102 upon which said judgment was made and entered may be duly authenticated and sent to the Circuit Court of Appeals for the Second Circuit, and that a citation be issued as provided by law.

Dated, New York, August 28, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the Southern District of New York; Office & P. O. address, Old Post Office Building, Borough of Manhattan, New York City.

It is ordered that the appeal, as above prayed for, be and the same hereby is allowed.

Dated, New York, August 28, 1931.

J. W. MACK,
U. S. D. J.

103 In United States District Court

[Title omitted.]

Assignment of errors

The above-named defendant, Charles W. Anderson, collector of internal revenue for the third district of New York, for his assignment of errors, respectfully alleges that:

First: The District Court erred in holding that the plaintiff's testator, Richard T. Wilson, jr., in computing his net income for the calendar year 1922 under the revenue act of 1921, was entitled to deduct from his gross income the sum of $22,660 as his proportionate share of the loss sustained on the sale of a certain building called the "Commercial Building."

Second: The District Court erred in holding that the plaintiffs were entitled to judgment against the defendant in the sum

104 of $14,408.62, together with interest thereon from February 15, 1927, according to law, with costs as taxed of $30.

Third: The District Court erred in not holding as a conclusion of law that the testator, Richard T. Wilson, sr., did not by his will expressly give his real property, including the Commercial Building, to anyone, but imperatively directed his executors to sell it within two lives in being.

Fourth: The District Court erred in not holding that by the will of the testator, Richard T. Wilson, sr., the executors named therein were empowered to collect the income and profits during the period they held and managed the real property, including the Commercial Building.

Fifth: The District Court erred in not holding that the testator, Richard T. Wilson, sr., in his will intended that before distribution, his realty should be converted to personalty.

Sixth: The District Court erred in not holding that by the will of the testator, Richard T. Wilson, sr., there was created a residuary trust of his realty, including the Commercial Building, by virtue of the executors' control over the real property and the income therefrom, pending its sale and distribution, and said trust was valid under the New York real property law, section 96, subdivision 2, as one to sell for the benefit of legatees.

105 Seventh: The District Court erred in not holding that by the will of the testator, Richard T. Wilson, sr., he created a valid residuary trust of his real property, including the Commercial Building, under the New York real property law, section 96, subdivision 3, for the receipt of the rents and profits of said real property, and the application of them to the use of specified legatees during their lives.

Eighth: The District Court erred in not holding that because of the existence of a valid trust of the real property, including the Commercial Building, of the testator, Richard T. Wilson, sr., under his will, the loss sustained upon the sale of the Commercial Building in 1922 was not, in a proportionate amount, deductible from the gross income of the beneficiary, Richard T. Wilson, jr.

Ninth: The District Court erred in denying the conclusions of law numbered "1" to "8," inclusive, as proposed by the defendant.

Tenth: The District Court erred in not holding that the defendant is entitled to judgment dismissing the complaint on the merits, together with costs.

Wherefore, the defendant respectfully prays that the judgment of the United States District Court for the Southern District of New York, made and entered herein on the 9th day of June, 1931, be reversed and that the said District Court be directed to enter judgment dismissing the complaint on the merits; and in

106 order that the foregoing assignment of errors be a part of the record, the defendant presents the same to this court and prays that such disposition may be made thereof as is in accordance

with the law and the Constitution of the United States in such case made and provided, all of which is respectfully submitted.

Dated, New York, August 28th, 1931.

GEORGE Z. MEDALIE,
United States Attorney for the Southern District of New York; office & P. O. address, Old Post Office Building, Borough of Manhattan, New York City.

107 [Citation in usual form omitted in printing.]

108 In United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Stipulation as to record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States District Court for the Southern District of New York in the above-entitled action, as agreed upon by the parties.

Dated: New York, N. Y., January 9, 1932.

GEORGE Z. MEDALIE,
United States Attorney,
Attorney for Defendant-Appellant.

ROOT, CLARK & BUCKNER,
Attorneys for Plaintiffs-Appellees.

109 [Clerk's certificate to foregoing transcript omitted in printing.]

110 In United States Circuit Court of Appeals for the Second Circuit

No. 319—October term, 1931

Argued March 22, 1932. Decided July 11, 1932

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

MARIAN STEEDMAN WILSON, ROBERT GOELET AND HARLEM G. ROBERT, as Executors of the Estate of Richard T. Wilson, jr., plaintiffs-appellees

v.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of New York, defendant-appellant

From a judgment that plaintiffs recover $14.438.62 from the defendant collector of internal revenue representing an additional

assessment of income taxes paid by plaintiff's testator under protest, the defendant appeals. Reversed.

George Z. Medalie, U. S. atty., of New York City (Walter H. Schulman, asst. U. S. atty., of New York City, of counsel), for defendant-appellant.

Root, Clark & Buckner, of New York City (George E. Cleary, of New York City, and Clark T. Brown, of Washington, D. C., of counsel), for plaintiffs-appellees.

Opinion

AUGUSTUS N. HAND, *Circuit Judge.*

The question before us is whether the plaintiffs' testator, Richard T. Wilson, jr., was entitled to claim a deduction in his personal income tax return for 1922 by reason of a sale made in that year at a loss by the executors of the will of his father, Richard T. Wilson, sr. The sale was of real estate, in which the son had an undivided fifth interest. The Commissioner of Internal Revenue disallowed the loss which Wilson had claimed in his return and demanded payment of an additional tax based on the exclusion of the deduction in making the assessment. The taxpayer paid the additional assessment, with interest, under protest, and brought this action against the collector to recover the amount of the payment. It is conceded that, if the deduction was proper, Wilson's executors, who because of his death after bringing this action were substituted as parties plaintiff, were entitled to recover back the additional tax amounting to $11,909.59 and $2,499.03, the interest he had paid, together with interest on both amounts since the payment.

If the real estate was devised to the taxpayer directly, subject only to a mere power of sale by the executors of his father's will, there can be no doubt that he was entitled to the deduction claimed in his return. The plaintiffs insist that this is the effect of the will, but the Government contends that the executors were trustees for Wilson, and that as fiduciaries they were the persons responsible for making the return for a trust estate as a taxable entity. If so, they could not have availed themselves of the deduction, for there was no income in their hands from which it could be taken.

The will of Richard T. Wilson, sr., after giving $500,000 (by the third article) in trust for Richard T. Wilson, jr., contained a residuary clause under which the real estate in question was disposed of as follows:

111 "All the rest, residue, and remainder of my property, real, personal, and of every kind and description, which I shall own at the time of my death, I direct my executors hereinafter named to sell and convert into personalty, and to divide the proceeds thereof into five equal parts which I give and bequeath as follows:

"(3) One of such parts to the amount of $500,000 I direct to be added to the trust fund of $500,000 created in and by the foregoing third article of this will for the benefit of my son, Richard T.

Wilson, jr., and to be subject to the provisions of said third article, both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; and the balance of such part I give and bequeath to my said son, Richard T. Wilson, jr., to be his absolutely."

After making provision for the constitution and investment of trusts for his wife and children out of securities other than stocks of business and manufacturing corporations which he held, the will went on to say:

"As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding however a period longer than the lives of my sons, Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them, and I hereby authorize and empower my said executors within said period, to sell, convey, assign, and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor. * * *

"Upon any sale or disposition being made by my said executors of such portion of my residuary estate, or any part thereof, * * * I authorize and empower my said executors if the proceeds, or any part thereof, may in their judgment be distributed among the persons entitled thereto hereunder without any detriment to their interests to so distribute them forthwith; or in their discretion to retain the same, or any part thereof, for further conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them.

"During the period that my said executors shall hold such portion of my residuary estate * * * they shall semiannually pay over the net income thereof, or of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed * * * in the proportion of their respective interests."

In the years 1911 and 1912 the executors of Richard T. Wilson, sr., set up all of the trusts and additions thereto (such as the trust of $500,000 for Richard T. Wilson, jr., and the additional trust of $500,000 for him) as directed by the will. Prior to 1922 all of the assets of the decedent not used in setting up these trusts had been distributed except the real estate above mentioned known as the Commercial Building in New York City, and certain other real estate of a value of approximately $41,000, and certain personal property of a value of approximately $150,000. In 1922 the executors sold the Commercial Building for $165,000, and in that year distributed $50,000 of funds in their hands among the five residuary legatees. This sale involved a loss of $113,300 based upon the value

of the building at the date of testator's death. One-fifth of this loss applicable to the interest of Richard T. Wilson, jr., was $22,660. The latter sum he attempted to deduct from his individual income for the year 1922 as a loss incurred during that year, and it was allowed by the trial court as a proper deduction.

The deduction is defended on behalf of the taxpayer upon the theory that there was no trust affecting the real estate but a mere power of sale, and that, if there was any trust, it was one to sell and distribute. We cannot agree with either contention. It is true that the will directed a sale and doubtless effected an equitable conversion of the real estate. But it also authorized the executors either to distribute the proceeds, if such distribution was not detrimental to the interest of the testator's children, "or in their discretion to retain the same, or any part thereof, for further conversion before distribution, not, however, beyond the period of the lives" of two of his sons. The will also directed the executors to "hold and manage" the real estate in question as well as other portions of the residuary estate until it could in the judgment of the executors
112 be "advantageously sold and disposed of," subject to the above limitation of two lives. It further provided that for the period during which the executors might hold any portion of the residuary estate they should semiannually pay over the net income "of such parts thereof as may be unsold or undistributed, to the persons to whom (the) residuary estate is bequeathed * * * in the proportion of their respective interests." It is clear from the foregoing that the will created trusts in the residuary estate. The executors were not only directed to "hold and manage" it pending a sale, but were also authorized, should they think best, to retain the proceeds of any of it which they might sell during a period measured by lives and to pay over the income of any parts undistributed. Such provisions go far beyond a mere direction to receive and apply income pending a sale and create trusts in such part of the proceeds of sale as the executors may choose to hold. The case is entirely different from a bare trust to sell and distribute and to collect the income meanwhile. Munger v. Commissioner, 16 B. T. A. 168.

We are not disposed to interpret the provision that the executors may retain proceeds of sale "for further conversion before distribution" as limited to cases where sales might be made other than for cash. It is much more reasonable to suppose that the words "further conversion" related as well to the reinvestment of cash derived from sales. Otherwise it is hard to explain the clause directing the executors to pay over semiannually the net income of such parts of the residuary estate as might be "sold or undistributed" and the provision empowering the executors to hold the rest and pay over the income during such a long period as two lives in being.

We conclude that the will created trusts in the residuary estate of which the Commercial Building formed a part and that these trusts

were to continue irrespective of any sales so far as the executors chose to hold rather than to distribute the proceeds. The record indicates that after the sale in question the executors continued to hold at least all but $50,000 of the $165,000 realized from the sale of the Commercial Building. To what extent any part of the $50,000 is to be allocated to the proceeds of that property we need not say, for in any event the greater part of the proceeds was not distributed, but remained in the residuary trusts after the year 1922.

If the sale of Commercial Building had resulted in a profit rather than a loss, so far as the proceeds were retained for future distribution and were not distributed, section 219 (a) (3) of the revenue act of 1921 (42 Stat. 246) would have been applicable. Under section 219 (a) (3) and 219 (c) the executors would have had to make the returns as fiduciaries and to pay the tax on such profit as inhered in the proceeds retained. We think that the same clauses would necessarily require any losses incurred in transactions entered into for profit and affecting proceeds retained to be deducted from the executors' return. Section 214 (a), 42 Stat. 239.

So far as the proceeds from the sale were distributed in 1922 to the legatees, the case would fall within section 219 (a) (4) which covers "income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals." Under section 219 (d) any income thus distributed should be included in computing the net income of each beneficiary. Losses affecting the amount distributed must be treated in the same way. The word "periodically" in section 219 (a) (4), when taken in connection with the words "whether or not at regular intervals," means no more than at a time fixed by the will or by the election of the executors to distribute in accordance with its provisions. Barton v. Commissioner, 5 B. T. A. 1008.

Article 342 of Regulations 62 provides that: "Where under the terms of the will * * * the trustee may in his discretion distribute the income or accumulate it, the income is taxed to the trustees irrespective of the exercise of the discretion." This article is said to deprive the beneficiary of the right to make any deduction for the loss even so far as it inhered in distributions actually made. But this regulation can hardly be applied to the present case, for it seems contrary to the provisions of section 219 (a) (4), 219 (d), and 219 (e). Appeal of Scripps, 1 B. T. A. 491; Barton v. Commissioner, 5 B. T. A. 1008; Appeal of Sprague, 8 B. T. A. 173; Henn v. Commissioner, 8 B. T. A. 190

To the extent that there was a distribution to the taxpayer of any part of the proceeds of the Commercial Building, he suffered a proportionate part of the loss incurred in the sale The distribution was of his capital investment, and any loss or impairment of it affected his net income just as a gain would have affected it in a favorable way had there been a profit. To this extent he may deduct
113 the loss from his individual return. Brewster v. Gage, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457.

It is said in the Government brief that "of $165,000 realized on the sale of the Commercial Building in 1922 only $50,000 was distributed to the residuary legatees." While we are not clear from the record to what extent this $50,000 was derivable either directly or by apportionment from the proceeds of sale of the Commercial Building, we hold that the taxpayer was entitled to deduct from his individual return that part of one-fifth of the total loss of $113,300 represented by the ratio which the distribution to the legatees in 1922 applicable to the proceeds of sale bears to the $165,000 realized. If the $50,000 was all derived from the proceeds of sale, the taxpayer would be entitled to deduct from his return $\frac{50,000}{165,000}$ of $\frac{\$113,300}{5}$ or $6,866.66; if it was not all so derived, the ratio employed would result in a smaller deduction.

The trial court deducted one-fifth of the entire loss of $113,300 incurred in the sale of the Commercial Building. This was error, for only the amount applicable to such part of the proceeds as was distributed to the taxpayer in 1922 may be deducted. That amount must be computed and fixed upon a new trial.

Judgment reversed.

114 In United States Circuit Court of Appeals, Second Circuit Circuit

MARION STEEDMAN WILSON ET AL., AS EXECUTORS, ETC., PLAINTIFFS-appellees

vs.

CHARLES W. ANDERSON, AS COLLECTOR, ETC., DEFENDANT-APPELLANT

Judgment

Filed July 18, 1932.

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

WM. PARKIN, *Clerk.*

116 [Clerk's certificate to foregoing transcript omitted in printing.]

115 [File endorsement omitted.]

117 Supreme Court of the United States

No. 460—October term, 1932

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of New York, Petitioner

vs.

MARIAN STEEDMAN WILSON, ROBERT GOELET AND HARLEM G. RUBERT, as Executors of the Estate of Richard T. Wilson, jr., deceased

Order allowing certiorari

Filed November 21, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

118 Supreme Court of the United States

No. 461—October term, 1932

MARIAN STEEDMAN WILSON, ROBERT GOELET AND HARLEM G. RUBERT, as Executors of the Estate of Richard T. Wilson, jr., deceased, petitioners

vs.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE FOR THE Third District of New York

Order allowing certiorari

Filed November 21, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsement on cover:) Enter Attorney General. File No. 37157 37158. U. S. Circuit Court of Appeals, Second Circuit, Term No. 460. Charles W. Anderson, Collector of Internal Revenue for the Third District of New York, petitioner, vs. Marian Steedman Wilson, Robert Goelet, and Harlem G. Rubert, as Executors of the Estate of Richard T. Wilson, jr., deceased. Enter George E. Cleary. Term No. 461. Marian Steedman Wilson, Robert Goelet and Harlem G. Rubert, as Executors of the Estate of Richard T. Wilson, jr., deceased, petitioner, vs. Charles W. Anderson, Collector of Internal Revenue for the Third District of New York. Petitions for writs of certiorari and exhibit thereto. Filed October 18, 1932. File Nos. 37157, 37158.

U. S. GOVERNMENT PRINTING OFFICE: 1933

INDEX

	Page
Petition:	
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	6
Reasons for granting the writ	7
Brief in Support of Petition:	
Opinions below	10
Jurisdiction	10
Question presented, statutes and regulations involved, etc.	10
Argument	10
Conclusion	17
Appendix	18–25

CITATIONS

Cases:	
Abell v. *Tait*, 30 F. (2d) 54, certiorari denied, 279 U. S. 849	7, 14, 15
Baltzell v. *Mitchell*, 3 F. (2d) 428, certiorari denied, 268 U. S. 690	7, 13, 15
Burnet v. *Thompson Oil & Gas Co.*, 283 U. S. 301	8, 16
Busch v. *Commissioner*, 50 F. (2d) 800	14
Codman v. *Commissioner*, 50 F. (2d) 763	15
Codman v. *Miles*, 28 F. (2d) 823, certiorari denied, 278 U. S. 654	14
Darby-Lynde Co. v. *Commissioner*, 51 F. (2d) 32	16
Goldfield Consolidated Mines Co. v. *Scott*, 247 U. S. 126	16
Hubbell v. *Burnet*, 46 F. (2d) 446, certiorari denied, 283 U. S. 840	14, 15
Kaufmann v. *Commissioner*, 44 F. (2d) 144	15
Kenan v. *Bowers*, 50 F. (2d) 112	14
Lahey v. *Kortright*, 132 N. Y. 450	11
Lynch, Executrix v. *Alworth-Stephens Co.*, 267 U. S. 364	16
Marx v. *McGlynn, Ex'r., etc., et al.*, 88 N. Y. 357	11
Merle-Smith v. *Commissioner*, 42 F. (2d) 837, certiorari denied, 282 U. S. 897	8, 15
Morse v. *Morse*, 85 N. Y. 53	11
Roxburghe, Mary, 64 C. Cls. 223, certiorari denied, 278 U. S. 598	14
Roxburghe v. *Burnet*, 58 F. (2d) 693, certiorari denied, 286 U. S. 567	15
Ward v. *Ward*, 105 N. Y. 68	11
Weiss v. *Wiener*, 279 U. S. 333	16
Whitcomb v. *Blair*, 25 F. (2d) 528	14, 15

	Page
Statutes:	
Revenue Act of 1918, c. 18, Sec. 219, 40 Stat., 1057, 1071	13, 21
Revenue Act of 1921, c. 136, 42 Stat. 227, 239, 246—	
Sec. 214	18
Sec. 219	19
McKinney's Consolidated Laws of New York Annotated, Book 49, Real Property Law—	
Sec. 96	24
Sec. 97	25
Miscellaneous:	
O. D. 156, C. B. 1 (1919), p. 181	14
Treasury Regulations 62—	
Art. 341	21
Art. 342	22
Art. 343	23
Art. 345	23
Art. 347	24

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. —

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE for the Third District of New York, petitioner

v.

MARIAN STEEDMAN WILSON, ROBERT GOELET, AND Harlem G. Rubert, as Executors of the Estate of Richard T. Wilson, deceased

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above cause on July 18, 1932, affirming in part and reversing in part the decision of the District Court for the Southern District of New York.

QUESTION PRESENTED

Under the terms of a trust created by will, a beneficiary was entitled to receive one-fifth of the annual income of the trust and one-fifth of any distributions of corpus which the trustees might make in the exercise of the discretion given them by the will. Real estate constituting a part of the corpus of the trust was sold at a loss in 1922. The question is whether any part of the loss sustained by the trust on the sale may be deducted in the individual return of the beneficiary.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations will be found in the Appendix, *infra*, pp. 18–25.

STATEMENT

This suit was instituted by Richard T. Wilson, Jr., a resident of the State of New York, to recover income taxes paid for 1922. He died while the litigation was pending and his executors were substituted as parties plaintiff. (R. 60.)

The District Court made special findings of fact (R. 59–79), based on certain stipulations of fact (R. 27–58) from which the following appears:

Richard T. Wilson, Sr., also a resident of the State of New York, died on November 26, 1910, the owner of real estate in that State of the value of $2,216,083.33 and a large amount of other property. Included in the real estate was an office building located at 384–6 Broadway, New York,

N. Y., known as the "Commercial Building." (R. 60, 72–73. His will was admitted to probate in New York County on December 13, 1910. (R. 60.)

The second article of the will gave his wife a life interest in a fund of $250,000. (R. 61.) The third article of the will (R. 61–62) directed the executors to set apart out of his estate five separate funds of $500,000 each to be given in trust to the Union Trust Company of New York to invest and reinvest the same and collect the net income therefrom and to pay over the net income of the funds to his two sons and three daughters, respectively, including Richard T. Wilson, Jr. At the death of any child, the principal of the fund was to pass to his lineal descendants then living, and in default of such lineal descendants, to his or her brothers and sisters then living or their lineal descendants, *per stirpes* and not *per capita*.

The fourth article of the will (R. 62–63) directed that the executors convert all of the rest of the testator's estate, whether real or personal, into personalty and to divide the proceeds into five equal parts. Two of these parts he gave to a son and a daughter absolutely. One part to the amount of $500,000 he directed to be added to the trust fund created for the benefit of Richard T. Wilson, Jr., subject to all the provisions of that trust, and the balance of such part to be his absolutely. Two other parts were similarly dealt with for the benefit of two of his daughters.

The fifth article (R. 63–68) directed his executors to first constitute the funds mentioned in the second and third articles, and then to constitute the additions to the trust funds for the benefit of Richard T. Wilson, Jr., and his two daughters which were provided for in the fourth article. Both the trusts and the additions thereto were to be constituted out of securities belonging to the estate at their market value or the proceeds thereof (other than shares of any manufacturing or business corporation) or securities purchased at their cost. This article further provided (R. 65):

> As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding however a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, Jr., and the survivor of them, and I hereby authorize and empower my said executors within said period, to sell, convey, assign and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor.

The executors were also authorized in their discretion to organize a corporation, to convey to it in return for its capital stock the whole or any part of the residuary estate, and to hold the stock until it could be disposed of advantageously. No such corporation was organized. They were further authorized upon the sale of any part of the residuary estate to distribute the proceeds forthwith or in their discretion to retain the same for further conversion before distribution. Prior to distribution the net income of the residuary estate or of the corporate shares was to be paid semiannually to the persons entitled to receive it under the fourth article. (R. 65–67.)

The trusts provided for in the will were set up out of personal property of the estate in 1911 and 1912. Prior to the year 1922 all of the debts of the decedent and of the estate except current expenses had been paid and almost all of the assets not used in setting up these trusts had been distributed. (R. 73, 75–76.)

The Commercial Building was not sold until 1922, when it was disposed of for $165,000. The sale involved a loss of $113,300, based upon the value of the building at the date of the testator's death. During 1922 the trustees distributed $50,000 to the so-called residuary legatees, but the record fails to disclose what, if any, portion of this amount was derived from the sale of the Commercial Building. (R. 75, 76.)

Richard T. Wilson deducted $22,660 or one-fifth of this loss in his return for 1922. (R. 78.)

The District Court and the Circuit Court of Appeals both held that the will of the testator created a residuary trust and that the Commercial Building constituted a part of the corpus of the trust. (R. 97, 110.)

The District Court allowed the total deduction claimed by Richard T. Wilson, Jr. The Circuit Court of Appeals held that to the extent that there was a distribution to the beneficiary of any part of the proceeds of the sale he suffered a proportionate part of the loss. Since the record failed to disclose what portion of the $50,000 distributed to the five so-called residuary legatees represented such proceeds, it held that if all of the distribution represented such proceeds the loss would be $\frac{50000}{165000}$ of $113,300, or $6,866.66 divided by five, and remanded the case for further proceedings.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that any part of the loss sustained by the Richard T. Wilson, Sr., Trust, upon the sale of real property constituting a part of the trust, was deductible in the return of the beneficiary, Richard T. Wilson, Jr.

2. In failing to hold that there is no statutory authority in the Revenue Act of 1921 for the deduction by a beneficiary of a trust of losses incurred

on the sale of trust assets, irrespective of whether the beneficiary may or may not receive distributions of corpus as well as of income.

REASONS FOR GRANTING THE WRIT

1. In so far as the court below held that any part of a loss sustained by a trust estate upon the sale of assets constituting a part of the corpus is deductible by a beneficiary, we believe that the decision conflicts in principle with *Abell* v. *Tait,* 30 F. (2d) 54 (C. C. A. 4th), certiorari denied, 279 U. S. 849, and *Baltzell* v. *Mitchell,* 3 F. (2d) 428 (C. C. A. 1st), certiorari denied, 268 U. S. 690, where it was determined that there was no statutory authority for the allowance of such losses to beneficiaries under Section 219 of the Revenue Acts of 1918 and 1921, *infra,* pp. 19–21. In the cases cited the beneficiaries received current distributions of income but were not entitled to receive any distributions of corpus at any time, whereas in the case at bar the beneficiary might receive such distributions of corpus as the trustee might make in the exercise of the discretion given to him in the will.

But Section 219 of the Revenue Act of 1921, *infra,* which provides for the taxation of income from trusts, does not distinguish between beneficiaries on that basis and does not provide for the allowance of losses to them whether they are entitled to distribution of corpus or not.

143068—32——2

We do not believe that the case of *Merle-Smith* v. *Commissioner,* 42 F. (2d) 837 (C. C. A. 2d), certiorari denied, 282 U. S. 897, furnishes a determinative rule. It was there held that a deduction for depletion should be allowed to a beneficiary who was entitled to 75 per cent of the income of the trust and would soon receive part of the corpus (at the age of forty-five) with power to dispose thereof by will at any time before. The depletion provision merely authorizes reasonable allowance for depletion without providing to whom it shall be allowed. On the other hand, losses to be deductible under Section 214 must be sustained in trade or business or in a transaction entered into for profit.

2. We believe that the decision below disregards the familiar principle stated in *Burnet* v. *Thompson Oil & Gas Co.,* 283 U. S. 301, and other cases that no deductions may be allowed unless specific authority therefor is found in the statute.

3. The question is one of general importance which will arise under all of the Revenue Acts to the present time. The Treasury Department has consistently treated a trust and the beneficiaries thereunder as separate taxable entities (except as such practice was limited by decisions similar to that in the *Merle-Smith* case, *supra*). This case not only overturns that principle but leaves entirely uncertain the limits of the application of its rule that one may secure the benefit of a deduction which by statute is allowable only to another. An

authoritative decision is needed for the guidance of the Treasury Department in its administration of the law.

Wherefore, it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1932.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 91–99) is reported in 51 F. (2d) 268. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 60 F. (2d) 52.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 18, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTES AND REGULATIONS INVOLVED, ETC.

A statement of the question presented, statutes and regulations involved, specification of errors to be urged, and a statement of the case will be found in the foregoing petition.

ARGUMENT

The court below correctly construed the will of Richard T. Wilson, Sr., as creating trusts in all of his undistributed residuary estate and correctly held that the trust for Richard T. Wilson, Jr., was

to continue irrespective of any sales so far as the executors (trustees) chose to hold rather than to distribute the proceeds, the executors (trustees) being authorized to hold the *res,* manage the property, sell and reinvest the proceeds and pay over the income of the trust annually during two lives in being.[1]

The question, then, is whether Richard T. Wilson, Jr., who received annual distributions of income under the trust and would receive distributions of corpus in so far as the trustees chose to make such distributions, is entitled in his individual return for 1922 to deduct a loss on the sale of property constituting a part of the corpus of the trust.

Under Section 219 of the Revenue Act of 1921, *infra,* pp. 19–21, trusts are classified according to the disposition to be made of the income and not according to the disposition to be made of the corpus, and the trust in this case falls under Section 219 (a) (4), for the reason that the income is to be distributed to the beneficiary periodically. Hence, under subdivision (d) no tax on the trust income is

[1] A will which directs the executors to convert real estate into personalty and in their discretion to withhold, convert, or distribute the proceeds and in the meanwhile to pay over the net income to designated beneficiaries, creates an express trust under Section 96 of the Real Property Law of New York, *infra,* pp. 24–25. See *Morse et al.* v. *Morse et al.,* 85 N. Y. 53; *Marx* v. *McGlynn, Ex'r, etc., et al.,* 88 N. Y. 357; *Ward* v. *Ward et al.,* 105 N. Y. 68; *Lahey* v. *Kortright,* 132 N. Y. 450.

to be paid by the fiduciary, but the beneficiary is required to report—

> that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, * * *.

Where the fiduciary receives income upon which he is taxed by Section 219, he of course may deduct losses sustained upon the sale of capital assets by virtue of the fact that Section 219 (b), *infra*, p. 19, provides that he shall be taxed as an individual and the fiduciary would be entitled to any deduction which an individual might take under Section 214 (a), *infra*, p. 18.

But there is no authorization in the statute for the deduction of such losses by the beneficiary when he and not the fiduciary is taxed. Section 219 does not provide that the trust income to be reported by him in his return, that is, the share of the trust income which is distributable to him under the terms of the will or deed, shall be reduced by capital losses sustained by the trust. If Congress had intended that it should be so reduced under such circumstances, it would probably have said so, for it expressly provided that a beneficiary of a trust coming under Section 219 (a) (4) should receive a proportionate part of the personal exemption allowable to a trust. Section 219 (d), *infra*, p. 20.

Two Circuit Courts of Appeals have held that a beneficiary may not deduct any portion of a loss sustained on the sale of capital assets by a fiduciary.

The case of *Baltzell* v. *Mitchell,* 3 F. (2d) 428 (C. C. A. 1st), certiorari denied, 268 U. S. 690, arose under the Revenue Act of 1918, Section 219 of which was substantially the same as Section 219 of the Revenue Act of 1921, here involved. The court there held that a beneficiary was required to report the income distributable to her under the terms of the will and that she could not deduct from it any loss on the sale of capital assets by the trustee. The court said (pp. 430–431):

> It cannot be supposed that Congress intended that the taxes under sections 210 and 211 should be paid by an individual who was engaged in some business or gainful occupation which yielded an income upon which such tax could be levied and collected, and also provided that the beneficiary of a trust, although paid a large amount in accordance with the terms of such trust, should escape all taxation upon the amount so paid, because the trust, as such, through losses of capital, did not show a net income. The fiduciary and the beneficiary are separate taxable persons. *Merchants' Loan & Trust Co.* v. *Smietanka,* 255 U. S. 509, * * *, 15 A. L. R. 1305. The fiduciary is to pay the tax upon the net income of the estate or trust, and, in determining this net income, gains and losses of capital are to be considered.

The court further held that the beneficiary could not claim a loss in computing net income on her individual return, for the loss was not sustained in

trade or business or in a transaction entered into for profit within the meaning of Section 214 (a) (4) and (5), *infra*. Cf. *Kenan* v. *Bowers*, 50 F. (2d) 112 (C. C. A. 2d), and *Busch* v. *Commissioner*, 50 F. (2d) 800 (C. C. A. 5th), where it was recognized that the business and transactions of the trust are not the business and transactions of the beneficiary.

The same conclusion was reached in *Abell* v. *Tait*, 30 F. (2d) 54 (C. C. A. 4th), certiorari denied, 279 U. S. 849. In that case also the court recognized that the trust and the beneficiary were separate taxable entities and that the beneficiary could not deduct a loss which under the law was only allowable to the trust.

The Treasury Department has consistently taken the same view, following O. D. 156, C. B. 1 (1919), p. 181, which has never been revoked.

The same principle has been applied in a number of cases holding that a beneficiary may not deduct depreciation of the trust assets.[2] *Mary Roxburghe*, 64 C. Cls. 223, certiorari denied, 278 U. S. 598; *Whitcomb* v. *Blair*, 25 F. (2d) 528 (App. D. C.); *Codman* v. *Miles*, 28 F. (2d) 823 (C. C. A. 4th), certiorari denied, 278 U. S. 654; *Hubbell* v. *Burnet*, 46 F. (2d) 446 (C. C. A. 8th), certiorari

[2] The beneficiary, of course, may get the benefit of a deduction for depreciation in the event that the will provides that he shall receive only the income which remains after the allowance of depreciation. *Hubbell* v. *Burnet*, *infra*.

denied, 283 U. S. 840; *Codman* v. *Commissioner,* 50 F. (2d) 763 (C. C. A. 1st); *Roxburghe* v. *Burnet,* 58 F. (2d) 693, certiorari denied, 286 U. S. 567. See also *Kaufmann* v. *Commissioner,* 44 F. (2d) 144 (C. C. A. 3d).

While in the cases cited, with the exception of the *Kaufmann* case, it did not appear that the particular beneficiary would be entitled at any time to receive distributions of corpus, the courts have not based their decisions solely upon the fact that the beneficiary had no interest in the corpus, but have also relied upon the fact that the beneficiary and the trust are separate taxable entities and that the statute does not provide for the deduction of capital losses and depreciation in determining the distributive shares of beneficiaries. See *Baltzell* v. *Mitchell, supra; Hubbell* v. *Burnet, supra; Whitcomb* v. *Blair, supra.*

In the *Kaufmann* case, *supra,* it was held that a widow to whom the testator gave income from property for life with privilege of invading the corpus was not entitled to depreciation.

We do not believe that the case of *Merle-Smith* v. *Commissioner,* 42 F. (2d) 837 (C. C. A. 2d), certiorari denied, 282 U. S. 897 harmonizes this case with the cases of *Abell* v. *Tait, supra,* and *Baltzell* v. *Mitchell, supra.* In that case it was held that a beneficiary entitled to royalties from mining properties held in trust with a remainder interest in the corpus, shortly to become vested, was taxable only

upon the excess of the royalties received over the depletion sustained. The decision there appears to have been based partly upon the theory that the beneficiary had a real interest in the corpus of the trust and partly upon the peculiar nature of depletion. See *Weiss* v. *Wiener*, 279 U. S. 333. The statute allowing depletion merely provides for a deduction of a reasonable allowance for depletion and provides for the equitable apportionment of depletion between lessors and lessees. The loss provisions are not so broad and leave no room for equitable considerations. They permit the deduction only of specific losses.

Deductions may be claimed only to the extent that they are authorized by statute. *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301; *Lynch, Executrix,* v. *Alworth-Stephens Co.*, 267 U. S. 364; *Goldfield Consolidated Mines Co.* v. *Scott*, 247 U. S. 126; *Darby-Lynde Co.* v. *Commissioner*, 51 F. (2d) 32 (C. C. A. 10th). Since the beneficiary in this case can not point to any provision in the statute which authorizes the deduction claimed, we submit that it is not allowable.

The court below allowed only a part of the loss, holding that the amount allowable depended upon the proceeds of the sale distributed during the taxable year. We believe that a discussion of the merits of a deduction on that basis has no place in this petition, for our position is that no portion of the loss is deductible.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals was erroneous, and that, in view of the general importance of the question decided and the existence of a conflict in principle between that decision and decisions of other Circuit Courts of Appeals, the petition for certiorari should be granted.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.

OCTOBER, 1932.

APPENDIX

REVENUE ACT OF 1921, C. 136, 42 STAT. 227, 239, 246

SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * *

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a nonresident alien individual only if and to the extent that the profit, if such transaction had resulted in a profit, would be taxable under this title. No deduction shall be allowed under this paragraph for any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities made after the passage of this Act where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition. If such acquisition is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed;

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

(3) Income held for future distribution under the terms of the will or trust; and

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) there shall also be allowed as a deduction, without limitation, any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (11) of subdivision (a) of section 214. In cases in which there is any income of the class described in paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each bene-

ficiary, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a), or in any other case within subdivision (a) of this section, except paragraph (4) thereof, the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed

to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

(c) In the case of an estate or trust the income of which consists both of income of the class described in paragraph (4) of subdivision (a) of this section and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with subdivision (b) and the tax shall be imposed, and shall be paid by the fiduciary in accordance with subdivision (c), except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in paragraph (4) of subdivision (a) which, pursuant to the instrument or order governing the distribution, is distributable during its taxable year to the beneficiaries. In cases under this subdivision there shall be included, as provided in subdivision (d) of this section, in computing the net income of each beneficiary, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable during the taxable year to such beneficiary. Section 219 of the Revenue Act of 1918, 40 Stat. 1057, 1071, contained similar provisions with the exception of subdivision (e).

TREASURY REGULATIONS 62

ART. 341. *Estates and trusts.*—While certain estates and trusts are subject to tax as such and others are not, the fiduciary in every case is required to make a return of income. See section 225 of the

statute and articles 421–425. The net income of an estate or trust shall be computed in the same manner and on the same basis as the net income of an individual, except that in place of the deduction allowed individuals of certain gifts or contributions there may be deducted, without limitation, from the gross income any part of it which during the taxable year is pursuant to the will or trust deed paid or permanently set aside in the manner specified in section 214 (a) (11). See section 212 and articles 21–26.

ART. 342. *Estates and trusts taxed to fiduciary.*— In the case of (a) estates of decedents before final settlement, (b) trusts, whether created by will or deed, for accumulation of income, whether for unascertained persons or persons with contingent interests or otherwise, and in any other case within section 219 (a) except paragraph 4 thereof, the income is taxed to the fiduciary as to any single individual, except that from the income of a decedent's estate there may first be deducted any amount of income properly paid or credited to a beneficiary. See section 200 of the statute and articles 1521 and 1522. Where under the terms of the will or deed the trustee may in his discretion distribute the income or accumulate it, the income is taxed to the trustee irrespective of the exercise of the discretion. The imposition of the tax is not affected by the fact that an ultimate beneficiary may be a person exempt from tax. An allowance paid a widow out of the corpus of the estate is not deductible from gross income. As an intestate's real estate does not pass to his administrator, upon a sale by the heirs, whether before or after settle-

ment of the estate, each heir is taxed individually on any profit derived.

ART. 343. *Decedent's estate during administration.*—The "period of administration or settlement of the estate" is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. Where an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. No taxable income is realized from the passage of property to the executor or administrator on the death of the decedent, even though it may have appreciated in value since the decedent acquired it. In the event of delivery of property in kind to a legatee or distributee, no income is realized. Where, however, the executor sells property of the estate for more than its value at the death of the decedent, the excess is income, or may be capital gain, taxable to the estate. See articles 1562 and 1563.

ART. 345. *Estates and trusts taxed to beneficiaries.*—In the case of (a) a trust the income of which is distributable periodically, (b) an ordinary guardianship of a minor, and (c) an estate of a decedent before final settlement as to any income properly paid or credited as such to a beneficiary, the income is taxable directly to the beneficiary or beneficiaries. Each such beneficiary must include

in his return his distributive share of the net income, even though not yet paid him, but if his taxable year is different from that of the estate or trust, then he need only include in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within his taxable year. The regulations governing partnerships are generally applicable to such an estate or trust. See articles 331–335.

ART. 347. *Estates and trusts with income which is distributed periodically, and other income.*—In the case of an estate or trust, the income of which consists both of income to be distributed to beneficiaries periodically and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with section 219 (b) and the tax shall be imposed and paid by the fiduciary in accordance with section 219 (c), except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in section 219 (a) (4) which, pursuant to the will or trust deed, is distributable during its taxable year to the beneficiaries. Each of such beneficiaries shall include, in computing his net income, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to him during the taxable year.

McKINNEY'S CONSOLIDATED LAWS OF NEW YORK, ANNOTATED, BOOK 49, REAL PROPERTY LAW

SEC. 96. *Purposes for which express trusts may be created.*—An express trust may be created for one or more of the following purposes:

1. To sell real property for the benefit of creditors;

2. To sell, mortgage, or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;

4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law.

SEC. 97. *Certain devises to be deemed powers.*—A devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power.

U. S. GOVERNMENT PRINTING OFFICE 1953

Fil

Office

Reve

Supre

Marian Stebbins Wilson, Robert Goelet, and Harlem G. Rubert, as Executors of the Estate of Richard T. Wilson, Jr., Deceased,

Petitioners,

v.

Charles W. Anderson, Collector of Internal Revenue for the Third District of New York,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COLLECTOR

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	2
Statement	3
Specification of errors to be urged	6
Summary of argument	6
Argument	10
I. The beneficiary of a trust is not entitled to a deduction on account of a capital loss sustained by a sale of trust property	11
A. Section 214 of the Revenue Act of 1921 does not authorize the deduction claimed by the taxpayer	11
B. Section 219 of the Revenue Act of 1921 indicates the purpose of Congress to regard a trust for tax purposes as a distinct entity from the beneficiaries of the trust	19
II. The will of Richard T. Wilson, Sr., created a trust of his residuary estate	26
Conclusion	34
Appendix (Statutes and Regulations involved)	35–43

CITATIONS

Cases:

Abell v. *Tait*, 30 F. (2d) 54, certiorari denied, 279 U. S. 849	16, 23
Alphin v. *Commissioner*, 21 B. T. A. 1101	24
Balkwill v. *Commissioner*, 25 B. T. A. 1147	16
Baltzell v. *Mitchell*, 3 F. (2d) 428, certiorari denied, 268 U. S. 690	16, 23
Brewster v. *Gage*, 280 U. S. 327	15
Brewster v. *Striker*, 2 N. Y. 19	30
Brooklyn Trust Co. v. *Kernan*, 108 Misc. 452, affirmed, 191 App. Div. 895	34
Burnet v. *Clark*, No. 180, Oct. Term, 1932	14
Burnet v. *Thompson Oil & Gas Co.*, 283 U. S. 301	11
Busch v. *Commissioner*, 50 F. (2d) 800	15, 16, 23, 26
Close v. *Farmers' Loan & Trust Co.*, 195 N. Y. 92	30
Codman v. *Commissioner*, 50 F. (2d) 763	18

Cases—Continued. Page

Codman v. *Miles*, 28 F. (2d) 823, certiorari denied, 278 U. S. 654 ---- 17
Colston v. *Burnet*, 59 F. (2d) 867, certiorari denied Oct. 17, 1932 ---- 13
Cooke v. *Platt*, 98 N. Y. 35 ---- 33
Dalton v. *Bowers*, No. 52, Oct. Term, 1932 ---- 14
Falk Corp. v. *Commissioner*, 60 F. (2d) 204 ---- 13
Goldborough v. *Burnet*, 46 F. (2d) 432 ---- 14
Haley v. *Commissioner*, 6 B. T. A. 782 ---- 15
Heermans v. *Burt*, 78 N. Y. 259 ---- 33
Henderson v. *Henderson*, 113 N. Y. 1 ---- 33
Hubbard v. *Housley*, 43 App. Div. 129 ---- 32
Hubbell v. *Burnet*, 46 F. (2d) 446, certiorari denied, 283 U. S. 840 ---- 17
Irwin v. *Gavit*, 268 U. S. 161 ---- 19
Kaufmann v. *Commissioner*, 44 F. (2d) 144 ---- 18
Kenan v. *Bowers*, 50 F. (2d) 112 ---- 14
Kuhn v. *Commissioner*, 24 B. T. A. 216 ---- 24
Lahey v. *Kortright*, 132 N. Y. 450 ---- 33
Little v. *White*, 47 F. (2d) 512 ---- 16
Lynch v. *Alworth-Stephens Co.*, 267 U. S. 364 ---- 25
Martin v. *Commissioner*, C. C. A. 2d, decided Dec. 5, 1932 ---- 26
Marx v. *McGlynn*, 88 N. Y. 357 ---- 30
McCabe v. *Commissioner*, 23 B. T. A. 1005 ---- 22
Mee v. *Gordon*, 187 N. Y. 400 ---- 30
Merle-Smith v. *Commissioner*, 42 F. (2d) 837, certiorari denied, 282 U. S. 897 ---- 24
Merriman v. *Commissioner*, 55 F. (2d) 879 ---- 14
Morse v. *Morse*, 85 N. Y. 53 ---- 10, 29, 30, 32, 33
Munger v. *Commissioner*, 16 B. T. A. 168 ---- 25
Nixon v. *Lucas*, 42 F. (2d) 833 ---- 21
Ogilby v. *Hickok*, 144 App. Div. 61, affirmed, 202 N. Y. 614 ---- 32
Palmer v. *Bender*, No. 215, October Term, 1932, decided January 9, 1933 ---- 25
People ex rel. Field v. *Gilchrist*, 240 N. Y. 301 ---- 25
Ray v. *Fowler*, 200 App. Div. 155 ---- 34
Rose v. *Grant*, 39 F. (2d) 338, certiorari dismissed, 283 U. S. 867 ---- 18
Roxburghe v. *Burnet*, 58 F. (2d) 693, certiorari denied, 286 U. S. 567 ---- 18
Roxburghe v. *United States*, 64 C. Cls. 223, certiorari denied, 278 U. S. 598 ---- 17
Russell v. *Hilton*, 80 App. Div. 178, affirmed, 175 N. Y. 525 ---- 32
Sevier v. *Commissioner*, 14 B. T. A. 709 ---- 17
Smietanka v. *First Trust & Savings Bank*, 257 U. S. 602 ---- 19
Stanton v. *Baltic Mining Co.*, 240 U. S. 103 ---- 11, 26
Steffanson, Appeal of, 1 B. T. A. 979 ---- 17
Stephenson v. *Commissioner*, 43 F. (2d) 348 ---- 14

Cases—Continued.	Page
Stern v. *Commissioner*, 14 B. T. A. 444	17
Striker v. *Daly*, 223 N. Y. 468	33
Studebaker, Appeal of, 2 B. T. A. 1020	15
Von Baumback v. *Sargent Land Co.*, 242 U. S. 503	11
Weil v. *Commissioner*, 11 B. T. A. 415	17
Weiss v. *Wiener*, 279 U. S. 333	25
Whitcomb v. *Blair*, 25 F. (2d) 528	17
Widener v. *Commissioner*, 8 B. T. A. 651, affirmed 33 F. (2d) 833	17
United States Statutes:	
Revenue Act of 1913, c. 16, 38 Stat. 114	19
Revenue Act of 1916, c. 463, 39 Stat. 756 Sec. 2	35
Revenue Act of 1921, c. 136, 42 Stat. 227—	
Sec. 2	23
Sec. 204	22
Sec. 214	36
Sec. 219	37
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 23	19
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 23	19
New York Statute:	
Real Property Law:	
Sec. 96	39
Sec. 97	40
Miscellaneous:	
American Law Institute, Restatement of Trusts, Sec. 9, Comment *b*	29
G. C. M. 9804, X-2, C. B. 353	24
O. D. 156, 1 C. B. 181	17
Treasury Regulations 62:	
Art. 341	40
Art. 342	41
Art. 343	41
Art. 345	42
Art. 347	43

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 460

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE for the Third District of New York, petitioner

v.

MARIAN STEEDMAN WILSON, ROBERT GOELET, AND Harlem G. Rubert, as executors of the estate of Richard T. Wilson, jr., deceased

No. 461

MARIAN STEEDMAN WILSON, ROBERT GOELET, AND Harlem G. Rubert, as executors of the estate of Richard T. Wilson, jr., deceased, petitioners

v.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL REVENUE for the Third District of New York

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COLLECTOR

OPINIONS BELOW

The opinion of the District Court (R. 40–45) is reported in 51 F. (2d) 268. The opinion of the

Circuit Court of Appeals (R. 48–53) is reported in 60 F. (2d) 52.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 18, 1932. (R. 53.) Petitions for writs of certiorari were filed by both parties on October 18, 1932, and were granted November 21, 1932. (R. 54.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

No. 460

1. Whether any part of the loss sustained on a sale of trust assets by a testamentary trustee may be deducted in the individual return of a beneficiary of the trust.

No. 461

2. Whether the interest of the taxpayer in a building included in the residuary estate of his father was that of a residuary legatee or that of a beneficiary of a trust.

3. If it is decided in No. 460 that the beneficiary is entitled to a deduction, whether that deduction should be limited to the proportion of the proceeds from the sale actually distributed to the beneficiary during the taxable year.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 35–43.

STATEMENT

This suit was commenced by Richard T. Wilson, Jr., a resident of New York, to recover income taxes paid for 1922. He died while the litigation was pending and his executors were substituted as parties plaintiff. (R. 1, 12, 26–27.) The District Court made special findings of fact (R. 27–36), based on a stipulation (R. 12–26), from which the following appears:

Richard T. Wilson, Sr., died on November 26, 1910, the owner of real estate in New York of the value of $2,216,083.33 and a large amount of other property. (R. 28, 33.) Included in the real estate was an office building in New York City, known as the "Commercial Building" which he had acquired at a cost of $210,000. (R. 33, 35.) His will was admitted to probate in New York County on December 13, 1910. (R. 28.)

The will directed the executors to establish five separate trust funds of $500,000 each for the benefit of the decedent's two sons and three daughters, including Richard T. Wilson, Jr., with remainders to their respective children. (R. 28.) The fourth article of the will (R. 28–29) directed the executors to convert all the rest of the testator's estate into personal property and to divide the proceeds into five equal parts. Two of these parts he gave to a son and a daughter absolutely. One part to the amount of $500,000 he directed to be added to the trust fund created for the benefit of Richard

T. Wilson, Jr., subject to all the provisions of that trust, and the balance of this part was to be his absolutely. Two other parts were similarly dealt with for the benefit of two of his daughters.

The fifth article of the will (R. 29–31) directed that the executors should first establish the funds already referred to out of securities belonging to the estate. This article then provided (R. 30):

> As the balance of my residuary estate will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said executors to hold and manage such remaining portion of my residuary estate until, in their judgment, it can from time to time be advantageously sold and disposed of, not exceeding however a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, jr., and the survivor of them, and I hereby authorize and empower my said executors within said period, to sell, convey, assign and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor.

The executors were also authorized in their discretion to organize a corporation, to convey to it in return for its capital stock the whole or any part of the residuary estate, and to hold the stock until

it could be disposed of advantageously. (R. 30.) No such corporation was organized. (R. 35.) They were further authorized upon the sale of any part of the residuary estate to distribute the proceeds forthwith or in their discretion to retain the same for further conversion before distribution. (R. 30–31.) Prior to distribution the net income of the residuary estate or of the corporate shares was to be paid semiannually to the persons entitled to receive it. (R. 31.) Distribution of the principal could not be deferred beyond the period of the lives of the two sons. (R. 30–31.)

The trusts provided for in the will were set up out of personal property in the estate in 1911 and 1912. Prior to the year 1922 all of the debts of the decedent and of the estate except current expenses had been paid and almost all of the assets not used in setting up these trusts had been distributed. (R. 34–35.)

In 1922 the executors sold the Commercial Building for $165,000. Allowing for depreciation, the loss sustained on this sale was $113,300. The loss shown on the return for the estate was $125,005.84, of which the decedent deducted one-fifth, or $25,001.17 in his return. It was subsequently agreed that one-fifth of the loss sustained was actually $22,660. (R. 15, 35.)

The Commissioner disallowed the loss claimed by the decedent and assessed an additional tax. A claim for refund was filed and rejected, and this

suit was brought to recover the amount paid, with interest. (R. 36.) The District Court held that the will of Richard T. Wilson, Sr., created a residuary trust, but allowed the taxpayer to deduct the entire loss which he claimed, that is, $22,660. (R. 44–45.) The Collector appealed. The Circuit Court of Appeals likewise held that the will created a residuary trust, but held that the decedent should be allowed a loss only to the extent that there was a distribution to him of part of the proceeds of the sale. (R. 53.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that any part of the loss sustained by the Richard T. Wilson, Sr., Trust upon the sale of real property constituting part of the trust was deductible in the return of the beneficiary, Richard T. Wilson, Jr.

2. In failing to hold that there is no statutory authority in the Revenue Act of 1921 for the deduction by a beneficiary of a trust of losses incurred on the sale of trust assets, irrespective of whether the beneficiary may or may not receive distribution of corpus as well as of income.

SUMMARY OF ARGUMENT

I

The beneficiary of a trust is not entitled to a deduction on account of a capital loss sustained by a

sale of trust property. Section 214 of the Revenue Act of 1921 contains no provision authorizing the deduction claimed by the taxpayer. Here, the beneficiary was never vested with any title or interest in the building. He had no right to the possession of the trust property, and no right to control its management or disposition. No part of *his* capital was invested by *him* in any transaction entered into for profit. Therefore, the words "incurred in any transaction entered into for profit" in Section 214 (a) (5) should not be so broadly construed as to cover the present situation.

In several cases it has been held that a beneficiary whose interest is not limited in point of time may not deduct his share of the "operating loss" of the trust, that is, the excess of the deductions allowable to the trust over the income it has received. These cases seem to be direct authority for our position. Our contentions are also supported by other cases, although many of them involve life tenant beneficiaries rather than beneficiaries of the full beneficial interest. In several cases it has been held that the life beneficiary of a trust is not entitled to take a deduction on account of a loss sustained on the sale of capital assets by the trustee. In other cases the life beneficiary of a trust has been denied a deduction for depreciation of the trust property.

It has been the uniform practice of the Treasury Department since 1919 not to allow the beneficiary

of a trust a deduction on account of a capital loss sustained by the trustee. This construction has been uniform and long continued, and we submit it should be followed by this Court.

Section 219 of the Revenue Act of 1921 indicates the purpose of Congress to regard a trust for tax purposes as a distinct entity from the beneficiaries of the trust. The trust in this case is one in which all of the trust income is distributable to the beneficiaries, and Section 219 (d) provides that in such a case "the tax shall not be paid by the fiduciary," but that in computing the net income of each beneficiary there shall be included his distributable share of the income of the trust. There is consequently no authority in Section 219 for permitting the beneficiary to report only the net amount, or to reduce the amount which he receives by a loss on a sale by the trustee of capital assets.

If Congress had intended that the distributive share of a beneficiary should be reduced by capital losses sustained by the trust, it seems reasonable to suppose that it would have said so. If the property in question had been sold at a gain instead of a loss, the gain would have been taxable to the trust, whether the trustees had exercised their discretion to distribute it to the beneficiaries within the taxable year or not. The trust could have deducted the present loss from such a gain in reporting its income. But the fact that the trust may have no income taxable to it against which the deduction may be offset is not material. An excess of deductions

over taxable income is frequently encountered in the practical administration of the tax statutes.

The courts generally have taken the view that a trust is made a separate taxable entity under Section 219, and that a beneficiary may not claim a loss sustained by the trust on the sale of capital assets. Section 219 does not classify trusts on the basis of the extent of the interests of the beneficiaries. Its classification is based on the disposition to be made of the trust income and not on the identity of the person who is ultimately entitled to the corpus. Section 219 as a whole indicates that the beneficiary and the trust are to be regarded as separate entities for tax purposes.

II

The executors of Richard T. Wilson, Jr., contend that his interest in the will of his father was that of a legal owner in fee, subject only to a power of sale in his father's executors, and that as a legal owner of a one-fifth interest in the building he was entitled to a deduction of one-fifth of the loss on its sale. Both courts below rejected this contention, and held that the interest of Richard T. Wilson, Jr., was that of a beneficiary of a trust of the residuary estate created by his father's will.

The conclusion that the will of Richard T. Wilson, Sr., created a trust of his residuary estate seems to us a necessary one. The will indicates plainly the purpose of the testator not to devise the

real estate as such to his children or to put it into their power to demand immediate distribution of the proceeds of the real estate. The broad powers given to the executors are consistent with the duties of trustees rather than executors. During the period of management the executors are directed to pay over the net income of the remaining residuary estate, a provision which is equivalent to an authorization to the executors to collect the rents of the real property and pay them over to designated beneficiaries. There is an unmistakable intention on the part of the testator to have the executors act as conservators and trustees, and to control and manage the estate for the benefit of the children.

The decisions in New York leave no room to doubt that the will of Richard T. Wilson, Sr., created a trust of his residuary real property, and that there is nothing in the New York statutes relating to trusts which requires a different conclusion. *Morse* v. *Morse,* 85 N. Y. 53, seems to us to be indistinguishable from the present case, and other New York decisions support the same conclusion.

ARGUMENT

The question presented by the Government's petition for certiorari is whether a beneficiary of a testamentary trust is entitled to a deduction on account of a capital loss resulting from the sale of

part of the trust property. This question is discussed in Point I, below.

The representatives of the taxpayer have also filed a petition for certiorari in which they contend that the will in question did not establish a trust, but created legal interests subject only to powers in the executors. This contention, which was rejected by both courts below, is discussed in Point II, below.

I

THE BENEFICIARY OF A TRUST IS NOT ENTITLED TO A DEDUCTION ON ACCOUNT OF A CAPITAL LOSS SUSTAINED BY A SALE OF TRUST PROPERTY

A. Section 214 of the Revenue Act of 1921 does not authorize the deduction claimed by the taxpayer

The taxpayer in this case is claiming a deduction from admitted gross income. It is well settled that a taxpayer is not entitled to a deduction as a matter of right, and may have only such deductions as are specifically authorized by the statute. *Burnet* v. *Thompson Oil & Gas Co.*, 283 U. S. 301; *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103. We submit that there is no provision in the Revenue Act of 1921 which allows a deduction to a taxpayer on account of a capital loss sustained by a trust of which he is a beneficiary.

The deductions from gross income which are allowed to an individual taxpayer are contained in Section 214 of the Revenue Act of 1921 (*infra*,

p. 36). It is not necessary to enumerate all of these deductions here; they relate to business expenses, interest and taxes paid, losses, worthless debts, obsolescence, depletion, and contributions. The only paragraphs of this section which could conceivably be relied on by the taxpayer are paragraphs (4) and (5). Paragraph (4) allows the deduction of losses "incurred in trade or business." The executors of the taxpayer apparently make no contention that they are entitled to a deduction under this paragraph.

Paragraph (5) allows the deduction from gross income of—

> Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; * * *

We submit that there are two reasons why this paragraph of Section 214 is not applicable to the situation in this case. (1) It is difficult to see how it can be said that the loss was incurred in a transaction which the taxpayer entered into for profit; and (2) the statute obviously refers to losses sustained by the taxpayer who is claiming the deduction, and it does not follow that a loss sustained by a trust is sustained by a taxpayer who is a beneficiary of the trust.

The words "any transaction entered into for profit," used in Section 214 (a) (5), disclose only

a purpose to permit a taxpayer to make deductions of capital losses whenever *he* sells at a loss capital which *he* has invested in an effort to make a profit. They involve the requirement that property previously acquired by the taxpayer, either by purchase or by gift, has been devoted exclusively to the production of taxable income by him. Other paragraphs of Section 214 (a) have been interpreted to allow a taxpayer a deduction for payments which he made only if the obligation was in a strict sense the taxpayer's personal obligation. Thus in *Colston* v. *Burnet,* 59 F. (2d) 867 (App. D. C.), certiorari denied October 17, 1932, a taxpayer was denied a deduction on account of interest and taxes which he had paid on property the title to which stood in his wife's name. A similar result as to taxes was reached in *Falk Corp.* v. *Commissioner,* 60 F. (2d) 204 (C. C. A. 7th). For the same reasons, we contend that when the statute refers to a "transaction entered into for profit," it means a transaction entered into by the taxpayer who is claiming the deduction.

Here, the building which was sold, with a resulting loss, was never the taxpayer's property. In fact, the will expressly directed the executor to sell the building and convert it into cash; thus, the beneficiary from the beginning had no interest in the building, for his interest under the will was in equity converted into personal property. The beneficiary was never vested with any title or in-

153458—33——3

terest in the building. He had no right to the possession of the trust property, and no right to control its management or disposition. His only right was to a share of the proceeds from the sale of all the residuary estate; he cannot single out a specific piece of property not actually distributed to him for the purpose of claiming a capital loss deduction because of the sale of that property at a loss by the executors. No part of *his* capital was invested by *him* in any transaction entered into for profit. Cf. *Dalton* v. *Bowers* and *Burnet* v. *Clark,* Nos. 52 and 180, October Term, 1932, decided December 12, 1932.

The words "incurred in any transaction entered into for profit" should not be so broadly construed as to cover the present situation. In *Merriman* v. *Commissioner,* 55 F. (2d) 879 (C. C. A. 1st), it was held that they were not broad enough to allow a taxpayer to deduct expenses incurred in a suit to break the will of a relative, although the taxpayer undoubtedly would have realized a gain if she had succeeded in her effort. See also *Stephenson* v. *Commissioner,* 43 F. (2d) 348 (C. C. A. 8th); *Goldborough* v. *Burnet,* 46 F. (2d) 432 (C. C. A. 4th).[1]

[1] In *Kenan* v. *Bowers,* 50 F. (2d) 112 (C. C. A. 2d), the beneficiary sought to deduct as a business expense compensation paid by her to testamentary trustees in addition to that fixed by the will. The expense, although actually incurred by the beneficiary, was disallowed as a deduction, because it was not incurred in a transaction which she was carrying on as her business.

It is argued that since the statute fixes the basis for the computation of a loss on the sale of property acquired by gift, devise or descent, it must be assumed that Congress intended all losses arising from the sale of such property to be deducted. *Brewster* v. *Gage,* 280 U. S. 327, is relied upon as authority to that effect. But in *Brewster* v. *Gage,* the taxpayer was a residuary legatee and had for some time been in possession of the property and received income from it. Here, the taxpayer never acquired the building on account of whose sale he seeks to deduct a loss. He was only the beneficiary of a trust, whose trustees were directed to sell the building and convert it into cash. The beneficiary never had any right to the possession of the trust property nor any right to control its management, nor even to direct or prevent the sale upon which the loss is predicated.

Of the many cases relating to this question, the group with facts most nearly like those here involved support our contentions. These cases involve the claim of a beneficiary whose interest is not limited in point of time to deduct his share of the "operating loss" of the trust, that is, the excess of the deductions allowable to the trust over the income it has received. In several cases it has been held that the beneficiary is not entitled to take this deduction on his own return. *Busch* v. *Commissioner,* 50 F. (2d) 800 (C. C. A. 5th); *Appeal of Studebaker,* 2 B. T. A. 1020; *Haley* v. *Commis-*

sioner, 6 B. T. A. 782; *Balkwill* v. *Commissioner,* 25 B. T. A. 1147; see also *Little* v. *White,* 47 F. (2d) 512 (C. C. A. 1st). These cases seem to us to be direct authority for our position. In the *Busch case,* the court said (p. 802):

> It was plainly provided by the statutes that, for the purpose of accounting and determination of its income, a trust is a separate taxpaying entity, and it is perfectly clear that a beneficiary of a trust may not claim as his own a loss which the estate has sustained. This has been the uniform practice of the Commissioner, and the uniform holding of the Board of Tax Appeals * * *, and we think it not only accords with the meaning and intent of the statutes, but that the statutes permit no other disposition.[2]

Our position is also supported by several other cases, although many of them involve life tenant beneficiaries rather than beneficiaries with the full beneficial interest. In *Baltzell* v. *Mitchell,* 3 F. (2d) 428 (C. C. A. 1st), certiorari denied, 268 U. S. 690, and in *Abell* v. *Tait,* 30 F. (2d) 54 (C. C. A. 4th), certiorari denied, 279 U. S. 849, it was held that life beneficiaries of a trust, with a possible ultimate interest in the corpus, are not entitled to take a deduction on account of a loss sustained on the

[2] The opinion in the *Busch case* also contains (p. 802) a discussion of Articles 332 and 345 of Regulations 62, upon which the executors rely, and shows clearly why they are not applicable.

sale of capital assets by the trustee. The Board of Tax Appeals has consistently held that a beneficiary of a trust may not deduct a loss sustained by the trustee upon the sale of assets of the trust, without making any distinction as to the duration of the beneficiary's interest. *Appeal of Steffanson,* 1 B. T. A. 979; *Widener* v. *Commissioner,* 8 B. T. A. 651, affirmed on other grounds, 33 F. (2d) 833 (C. C. A. 3d); *Weil* v. *Commissioner,* 11 B. T. A. 415; *Stern* v. *Commissioner,* 14 B. T. A. 444. Likewise a residuary legatee has been denied the right to deduct a loss sustained by the executors during the period of administration of the estate. *Sevier* v. *Commissioner,* 14 B. T. A. 709. The Treasury Department in 1919 adopted the rule that the beneficiary of a trust is not entitled to deduct such a loss (O. D. 156, 1 C. B. 181), and has not departed from it.

The courts have uniformly held that a life tenant beneficiary of a trust is not entitled to a deduction for depreciation of the trust property unless the will or deed specifically provides that such deduction shall be made before ascertaining his distributive share; and then the deduction is not for depreciation, but because the beneficiary's distributive share is diminished. *Roxburghe* v. *United States,* 64 C. Cls. 223, certiorari denied, 278 U. S. 598; *Whitcomb* v. *Blair,* 25 F. (2d) 528 (App. D. C.); *Codman* v. *Miles,* 28 F. (2d) 823 (C. C. A. 4th), certiorari denied, 278 U. S. 654; *Hubbell* v. *Burnet,* 46

F. (2d) 446 (C. C. A. 8th), certiorari denied, 283 U. S. 840; *Codman* v. *Commissioner,* 50 F. (2d) 763 (C. C. A. 1st); *Roxburghe* v. *Burnet,* 58 F. (2d) 693 (App. D. C.), certiorari denied, 286 U. S. 567. See also *Kaufmann* v. *Commissioner,* 44 F. (2d) 144 (C. C. A. 3d).

It is true that in many of the cases cited above the beneficiary involved did not have the full beneficial interest. Although this, of course, makes the cases distinguishable in fact from the present case, we submit that the distinction is not significant. We believe that these cases must turn on the fact that the property in question was held in trust, rather than on the nature and extent of the beneficiary's interest. A legal life tenant is entitled to a deduction for depreciation (*Rose* v. *Grant,* 39 F. (2d) 338 (C. C. A. 5th), certiorari dismissed, 283 U. S. 867); if an equitable life tenant is not entitled to such a deduction, it must be because of the trust and not because of the duration of his interest.

We submit, therefore, that there is no provision in Section 214 of the Revenue Act of 1924 which authorizes the deduction claimed by the taxpayer in this case. As we have pointed out above, it has been the uniform practice of the Treasury Department since 1919 not to allow the beneficiary of a trust a deduction on account of a capital loss sustained by the trustee. This construction has been uniform and long continued. With it in effect,

Congress has five times reenacted the revenue law without making any change on this question.[3] In such circumstances the administrative construction is entitled to great weight and, we submit, should be followed by this Court.

B. Section 219 of the Revenue Act of 1921 indicates the purpose of Congress to regard a trust for tax purposes as a distinct entity from the beneficiaries of the trust

The Revenue Act of 1913 did not contain any specific provisions taxing a trust as a separate entity, and in *Smietanka* v. *First Trust & Savings Bank,* 257 U. S. 602, it was held that trust income which was accumulated for beneficiaries not in being was not taxable under that Act. In *Irwin* v. *Gavit,* 268 U. S. 161, under the same Act, it was held that income distributed to a beneficiary was taxable as income to him.

In the Revenue Act of 1916 there was incorporated Section 2 (b) (*infra,* pp. 35–36), an express provision dealing with the taxation of income received by estates and trusts. This section provided for the taxation of trust income in certain cases to the trust itself, to be paid by the trustee. With this provision Congress first classified trusts as separate

[3] In Section 23 of the Revenue Acts of 1928 and 1932 specific provision is made for the apportionment of allowances for depreciation and depletion between beneficiaries and trustees; these Acts contain no such provisions as to capital losses.

taxable entities, and this classification has been continued and developed in subsequent Revenue Acts.

The section which relates to the taxability of trusts in the Revenue Act of 1921 is Section 219 (*infra*, pp. 37–39). This section contains no express provision that a beneficiary of a trust shall be allowed a deduction for a loss sustained on the sale of trust property; nor do we think that there is any room in Section 219 to imply an intention on the part of Congress that such a deduction should be allowed.

Three general situations are recognized in Section 219, so far as trusts are concerned: (1) Trusts in which the income is being accumulated in trust for future distribution, (2) trusts in which all of the income is distributed periodically, and (3) trusts in which part of the income is to be distributed to the beneficiaries periodically and part is held for future distribution. In the first and third classes, the trust itself is taxed on all or a portion of the income, and deductions are allowed on its returns for losses sustained. These deductions are allowable on the trust's return because Section 219 (b) provides that the net income of the trust shall be computed in the same manner (with certain exceptions not here material) "as provided in section 212," which relates to the computation of the net income of individuals.

The trust in this case is one in which all of the current trust income is distributable to the bene-

ficiaries, and Section 219 (d) provides that in such a case "the tax shall not be paid by the fiduciary," but—

> there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, * * *.

It should be noted that the statute refers to "income," not "net income," and the beneficiary is required to report all income that is distributable to him under the trust, whether actually distributed or not. Where the trust instrument authorizes all income to be distributed to the beneficiaries without providing that capital losses shall be first deducted, there is consequently no authority in Section 219 for permitting the beneficiary to report only the net amount or to reduce the amount reported by a loss on a sale by the trustee of capital assets. The statute makes the beneficiary taxable on his distributive share, and on all of his distributive share, just as a stockholder is taxed on the full amount of the dividends which he receives, and may not deduct a loss which the corporation sustained. *Nixon* v. *Lucas*, 42 F. (2d) 833 (C. C. A. 2d).

If Congress had intended that the distributive share of a beneficiary should be reduced by capital losses sustained by the trust, it seems reasonable to suppose that it would have said so. Express pro-

vision was made in the statute for other deductions to be made by the beneficiary,[4] and the fact that Congress did not provide for the deduction by a beneficiary of capital losses indicates its intention not to allow such a deduction. *Expressio unius est exclusio alterius.* If the property in question had been sold at a gain instead of a loss, the gain would have been taxable to the trust, whether the trustees had exercised their discretion to distribute it to the beneficiaries within the taxable year or not. Cf. Regulations 62, Article 342 (*infra*, p. 41); *McCabe* v. *Commissioner*, 23 B. T. A. 1005. The trust could, of course, have deducted the present loss from such a gain in reporting its income. But the fact that the trust may have no income taxable to it against which the deduction may be offset is not material. An excess of deductions over taxable income is frequently encountered in the practical administration of the tax statutes. The same situation is present as to capital losses and deductions for depreciation when the income of a trust is distributable to a life tenant beneficiary, and in such a case all the authorities agree that the beneficiary is not entitled to the deduction merely because it avails the trust nothing. See the cases cited on pp. 15–18, *supra*.

[4] Thus, in Section 219 (d) it is provided that a beneficiary of a trust may deduct from his distributive share for normal tax purposes his proportionate part of the amount received by the trust as dividends, and for all purposes his distributive share of the tax-exempt interest. And in Section 204 (c) it is provided that the benefit of the deduction for net losses should be allowed to the beneficiaries of a trust.

The courts generally have taken the view that a trust is made a separate taxable entity under Section 219, and that a beneficiary may not claim a loss sustained by the trust on the sale of capital assets.[5] The decisions in *Baltzell* v. *Mitchell,* 3 F. (2d) 428 (C. C. A. 1st), certiorari denied, 268 U. S. 690, *supra,* and in *Abell* v. *Tait,* 30 F. (2d) 54 (C. C. A. 4th) certiorari denied, 279 U. S. 849, *supra,* were placed on this ground. In the *Baltzell case* the court said (p. 431): "The fiduciary and the beneficiary are separate taxable persons." In *Busch* v. *Commissioner,* 50 F. (2d) 800, 801 (C. C. A. 5th), *supra,* the court said "a trust is an entity entirely separate from its beneficiaries."

Section 219 does not classify trusts on the basis of the extent of the interests of the beneficiaries. Its classification is based on the disposition to be made of the income and not on the identity of the person who is ultimately entitled to the corpus. Section 219 expressly requires the trustee of a trust such as the one here involved to file a return showing the amount of income distributable to each beneficiary, and the beneficiary is taxed upon his distributive share, whether distributed or not. There is no indication that the beneficiary is to be relieved of this tax to the extent that he has received distributions of corpus, as well as of income, and the distributions in question are made from property sold at a loss. On the contrary, the re-

[5] Section 2 (9) of the Revenue Act of 1921 defines the word "taxpayer" as including a trust.

quirement that the beneficiary pay a tax upon his distributive share of income is made without restriction of any sort, and Section 219 as a whole indicates that the beneficiary and the trust are to be regarded as separate entities.

In this connection it should be remembered that the provisions of Section 219 were devised for the purpose of preventing the escape of trust income from taxation and that Congress may well have intended that beneficiaries should not receive any greater benefits than were naturally derived from the division of income which resulted from the creation of the trust with the consequent reduction of surtax.

The only decision in which the theory of the separate entity of the trust appears to have been ignored is the case of *Merle-Smith* v. *Commissioner*, 42 F. (2d) 837 (C. C. A. 2d), certiorari denied, 282 U. S. 897. In that case it was held that a beneficiary entitled to royalties from mining properties held in trust, with a remainder interest in the corpus, shortly to become vested in possession, was taxable only upon the excess of the royalties received over the depletion sustained.[6] Even if the decision in the *Merle-Smith case* is correct, it does

[6] Since the denial of the petition for certiorari in that case the Commissioner and the Board of Tax Appeals have allowed deductions for depletion to the beneficiaries of trusts who have a remainder interest in the corpus. *Alphin* v. *Commissioner*, 21 B. T. A. 1101; *Kuhn* v. *Commissioner*, 24 B. T. A. 216; G. C. M. 9804, X–2 C. B. 353.

not follow that it should control the decision here. The result reached in that case was in part due to the court's recognition of the peculiar nature of depletion. See *Weiss* v. *Wiener,* 279 U. S. 333. The court emphasized the decision in *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, that depletion in the case of a mine is to be allowed to everyone whose property right and interest therein is diminished by extraction and disposition of the deposit. See also *Palmer* v. *Bender,* No. 215, October Term, 1932, decided January 9, 1933.

The District Court relied on *Munger* v. *Commissioner,* 16 B. T. A. 168, although the Circuit Court of Appeals held it inapplicable. We think the case is plainly distinguishable. The trust in question was of short duration, and the Board held that it was in fact only an agency, with the trustee having only the bare legal title. The same is true of several other Board decisions in which the beneficiary of a trust has been allowed a deduction.

People ex rel. Field v. *Gilchrist,* 240 N. Y. 301, arose under a New York tax statute, in construing which the court rejected the contention that a trust and one of its beneficiaries should be treated as separate entities, and allowed the beneficiary to deduct from his income the amount of taxes paid by the trustee on trust property. There the payment made by the trustee operated to reduce the beneficiary's income from the trust. Moreover, it was emphasized that the regulations of the State Tax Commission treated partnerships and estates

very much alike. Partnerships and trusts are treated alike to a limited extent under the Federal tax law, but they are not treated the same with respect to the deduction by a partner or beneficiary of a loss incurred in the operation of the partnership or trust. *Busch* v. *Commissioner,* 50 F. (2d) 800 (C. C. A. 5th), *supra.* In any event, the question here is plainly not affected by the construction of the New York statute.

We make no alternative argument to support the view of the court below that only a fractional part of the taxpayer's share of the loss should be deducted,[7] for we can see no authority in the statute for a deduction of any loss in this case. The statute authorizes the deduction by a taxpayer of "losses sustained," but, as we contend, Congress has not provided for the deduction of capital losses sustained by a trust from income of the beneficiary. This Court has declared that the courts may not grant a deduction which the law does not authorize. *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, *supra.*

II

THE WILL OF RICHARD T. WILSON, SR., CREATED A TRUST OF HIS RESIDUARY ESTATE

The executors of Richard T. Wilson, Jr., contend that his interest under the will of his father was that of a legal owner in fee, subject only to a power of sale in his father's executors, and that as

[7] Compare the decision of the same court in *Martin* v. *Commissioner,* C. C. A. 2d, decided December 5, 1932.

a legal owner of a one-fifth interest in the building, he was entitled to a deduction of one-fifth of the loss on its sale. Both courts below rejected this contention, and held that the interest of Richard T. Wilson, Jr., was that of a beneficiary of a trust of the residuary estate created by his father's will.

The conclusion that the will of Richard T. Wilson, Sr., created a trust of his residuary estate stands upon at least three grounds. (1) The will indicates plainly the purpose of the testator not to devise the real estate as such to his children, or to put it into their power to demand immediate distribution of the proceeds of the real estate; the will indicates a purpose to distribute personal property to the children and to defer the sale and distribution as long as the executors deem it to be for the best interests of the children, subject only to limitations required by the rule against restraint on alienation. (2) The broad powers given to the executors are consistent with the duties of trustees rather than executors. (3) During the period of management, the executors are directed to pay over the net income of the remaining residuary estate—a provision which is equivalent to an authorization to the executors to collect the rents of the real property and pay them over to designated beneficiaries.

The will expressly provides that the residuary real estate shall not pass as such to the residuary legatees. The fourth article of the will contains a positive direction that the executors shall con-

vert all of the residuary estate into personalty. (R. 28.) In view of this mandatory direction to the executors to convert the real estate into personalty, it seems clear that the decedent did not become a residuary legatee with respect to any real estate.

After making dispositions of part of his residuary estate, the testator disposed of what might be termed the remaining residuary estate. He expressly recognized that this part of his estate would "largely consist of real estate * * * and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions." (R. 30.) In view of this fact, he directed his executors "to hold and manage" this remaining portion of the residuary estate until in their judgment it could from time to time advantageously be sold. The executors were given complete discretion to sell the property as they might deem for the best interests of the estate. (R. 30.) They were given express authority to transfer the residuary estate to a holding corporation in exchange for its capital stock and to hold the stock until it could be disposed of advantageously. (R. 30.)

The will then authorized the disposition of the proceeds of any sale of the remaining residuary estate, if in the executors' judgment it might be distributed to the persons entitled "without any detriment to their interests," or in their discretion

to retain the proceeds, for further conversion, before distribution. (R. 30–31.) The executors were given the broadest powers in dealing with the property; they were authorized to vote stock constituting part of the remaining residuary estate, to consent to reorganizations of corporations, and "generally to have and exercise as to all such matters the powers of an individual owner who is under no trust obligation." (R. 31.) There is thus an unmistakable intention on the part of the testator to have the executors act as conservators and trustees and to control and manage the estate for the benefit of the children.[8]

The decisions in New York leave no room to doubt that the will of Richard T. Wilson, Sr., created a trust of his residuary real property, and that there is nothing in the New York statutes relating to trusts which requires a different conclusion. It is not essential to the creation of an express trust that the will specifically make a devise in trust to executors or trustees. *Morse* v. *Morse,* 85 N. Y.

---

[8] In American Law Institute, Restatement of Trusts, Sec. 9, Comment *b*, the rule is stated as follows: "In the absence of a statute otherwise providing, the duties of an executor are: (1) To reduce to possession the personal assets of the testator; (2) to pay the testator's debts; (3) to pay legacies; and (4) to distribute the surplus, if any, among the testator's next of kin.

"If a testator names the same person as executor and as trustee, he is acting as executor in performing the four duties named above; but in performing additional duties he is acting as trustee. * * *"

53; *Marx* v. *McGlynn,* 88 N. Y. 357; *Brewster* v. *Striker,* 2 N. Y. 19. So long as the testator has clothed his executors with the power and duty of executing an express trust, it is immaterial that he has not called them trustees or termed their position a trust. *Close* v. *Farmers' Loan & Trust Co.,* 195 N. Y. 92; *Mee* v. *Gordon,* 187 N. Y. 400.

Morse v. *Morse,* 85 N. Y. 53, *supra,* seems to us to be indistinguishable from the present case. There, the testator, after making certain specific bequests, gave five-sixths of his residuary estate, both real and personal, to five of his children to be divided equally among them. In one of the final clauses of the will, the executor was authorized to sell and convey any and all of the real estate "at such time and in such manner as he shall think it proper for the interests of my estate," and to rent and lease the real property until sold. In holding that the will created a trust and not an outright devise subject to a power of sale, the court said (pp. 59–60):

> * * * The direction to sell was imperative, and operated in equity as a conversion of the land into money. * * * There is no express direction in the will as to the disposition to be made by the executor of the rents received. But the reasonable inference and implication is, that they are to go to the persons beneficially interested in the estate. (*Moncrief* v. *Ross,* 50 N. Y. 431.) Nor does the will expressly authorize the

executor to receive the rents and profits of the land until sale. But the power to rent and lease the land carries with it and includes the power to receive the rents accruing from its execution.

We are of opinion that the will created a valid express trust in the executors, under the Revised Statutes, to sell lands for the benefit of legatees, under the second subdivision of section 55, before cited, and that the children of the testator took no title or estate in the land. To constitute a valid express trust, it is not necessary that the purpose of the trust should be stated in the precise words of the statute. It is undoubtedly necessary to a valid trust under the statute, that the trust shall be declared in the will, or other instrument, by which it is created. But no particular formula of words, need be used. It is not essential that the words "trust" or "trustee" should be used, or that there should be a direct devise in terms to the trustee, or that the authority to receive the rents and profits, should be conferred in express language. It is sufficient if the intention to create a trust under the statute, can be fairly collected from the instrument, and what is implied from the language used, is, as in other instruments, deemed to be expressed. Nor will the instrument necessarily fail as a trust, because the authority given could be executed by the creation of a mere power in trust. The test is whether the instrument confers upon the trustee an

> authority in respect to the land, and the power is conferred to accomplish one of the purposes mentioned in the fifty-fifth section of the statute. (*Vernon* v. *Vernon*, 53 N. Y. 351, and cases cited.)

The *Morse case* plainly disposes of the taxpayer's contention that the will did not create a valid trust under Section 96 of the New York Real Property Law (*infra*, pp. 39–40), because there was no express power to "receive the rents and profits of real property." Such a power may be implied; and here the necessity to imply the power is plain, because the executors are expressly authorized to "hold and manage" the property (R. 30), and to "pay over the net income thereof" (R. 31). The power to manage and the duty to pay over the net income clearly require the conclusion that the executors had power to receive the rents and profits. Other cases recognizing that the power to receive rents and profits may be implied are *Ogilby* v. *Hickok*, 144 App. Div. 61, affirmed, 202 N. Y. 614; *Hubbard* v. *Housley*, 43 App. Div. 129.

The trust was also valid under Section 96 of the New York Real Property Law (*infra*, pp. 39–40) as a trust to sell land for the benefit of legatees. In *Russell* v. *Hilton*, 80 App. Div. 178, affirmed, 175 N. Y. 525, under circumstances closely similar to the facts in the case at bar, the court said (p. 187):

> The trust in the executors to sell and convert the real estate into money and pay over and distribute the proceeds is a valid express trust to sell land for the benefit of legatees under subdivision 2 of section 55 of the Statute of Uses and Trusts, now section 76 [96] of the Real Property Law. (Laws of 1896, chap. 547.) The executors are not clothed with a mere power in trust, the land itself passing to the heirs; they are expressly authorized until a sale is made "to lease or let the same or any part thereof for such terms as they shall see fit." Thus they are empowered by implication to take the rents and profits until a sale is made. * * *

The taxpayer relies on Section 97 of the New York Real Property Law (*infra*, p. 40), but the New York courts have held that that statute does not apply where a positive direction to sell is accompanied by the right to receive and pay over the rents and profits, or where a discretionary power of sale is subservient to a purpose to have the rents and profits collected and paid over. *Morse* v. *Morse*, 85 N. Y. 53, *supra*; *Lahey* v. *Kortright*, 132 N. Y. 450; *Striker* v. *Daly*, 223 N. Y. 468

The cases cited by the taxpayer seem readily distinguishable. *Henderson* v. *Henderson*, 113 N. Y. 1, follows *Cooke* v. *Platt*, 98 N. Y. 35, in holding that Section 96 of the Real Property Law does not authorize a trust to partition and apportion a residuary estate where the power of sale is not mandatory. Here, the power of sale is mandatory. *Heer-*

mans v. *Burt*, 78 N. Y. 259, did not contain any specific direction for the disposition of the rents, and is plainly distinguishable on its facts. The same may be said of *Ray* v. *Fowler*, 200 App. Div. 155. In *Brooklyn Trust Co.* v. *Kernan*, 108 Misc. 452, affirmed, 191 App. Div. 895, the court construed the will as evidencing the testator's desire to transmit the property to the beneficiaries without awaiting the happening of any contingency. But here the intention of the testator that the beneficiaries shall not take the residuary estate *in specie* or at once is plain.

CONCLUSION

No part of the loss sustained upon the sale of the Commercial Building is deductible in the return of the beneficiary. The decision of the Circuit Court of Appeals allowing a refund should accordingly be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
G. A. YOUNGQUIST,
Assistant Attorneys General.
SEWALL KEY,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

JANUARY, 1933.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

UNITED STATES STATUTES

The Revenue Act of 1916, c. 463, 39 Stat. 756, 757, provided in part as follows:

> SEC. 2. * * *
>
> (b) Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be: *Provided*, That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.
>
> Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provi-

sions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting which they make as such trustees or other fiduciaries.

The Revenue Act of 1921, c. 136, 42 Stat. 227, 239, 240, 246, provided in part as follows:

SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * *

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;

(5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; but in the case of a nonresident alien individual only if and to the extent that the profit, if such transaction had resulted in a profit, would be taxable under this title. No deduction shall be allowed under this paragraph for any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities made after the passage of this Act where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition. If such acquisition is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed; * * *.

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

(3) Income held for future distribution under the terms of the will or trust; and

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) there shall also be allowed as a deduction, without limitation, any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for purposes and in the manner specified in paragraph (11) of subdivision (a) of section 214. In cases in which there is any income of the class described in paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary, whether or not distributed before

the close of the taxable year for which the return is made.

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purposes of the normal tax, be allowed as credits, in addition to the credits

allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

(e) In the case of an estate or trust the income of which consists both of income of the class described in paragraph (4) of subdivision (a) of this section and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with subdivision (b) and the tax shall be imposed, and shall be paid by the fiduciary in accordance with subdivision (c), except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in paragraph (4) of subdivision (a) which, pursuant to the instrument or order governing the distribution, is distributable during its taxable year to the beneficiaries. In cases under this subdivision there shall be inincluded, as provided in subdivision (d) of this section, in computing the net income of each beneficiary, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable during the taxable year to such beneficiary.

NEW YORK STATUTES

The New York Real Property Law provides in part as follows:

SEC. 96. *Purposes for which express trusts may be created.* An express trust may be created for one or more of the following purposes:

1. To sell real property for the benefit of creditors;

2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;

4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law.

SEC. 97. *Certain devises to be deemed powers.* A devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power.

REGULATIONS

Treasury Regulations 62, promulgated February 15, 1922, under the Revenue Act of 1921, provided in part as follows:

ART. 341. *Estates and trusts.*—While certain estates and trusts are subject to tax as such and others are not, the fiduciary in every case is required to make a return of income. See section 225 of the statute and articles 421–425. The net income of an estate or trust shall be computed in the same manner and on the same basis as the net income of an individual, except that in place of the deduction allowed individuals of certain gifts or contributions there may be

deducted, without limitation, from the gross income any part of it which during the taxable year is pursuant to the will or trust deed paid or permanently set aside in the manner specified in section 214 (a) (11). See section 212 and articles 21–26.

ART. 342. *Estates and trusts taxed to fiduciary.*—In the case of (a) estates of decedents before final settlement, (b) trusts, whether created by will or deed, for accumulation of income, whether for unascertained persons or persons with contingent interests or otherwise, and in any other case within section 219 (a) except paragraph 4 thereof, the income is taxed to the fiduciary as to any single individual, except that from the income of a decedent's estate there may first be deducted any amount of income properly paid or credited to a beneficiary. See section 200 of the statute and articles 1521 and 1522. Where under the terms of the will or deed the trustee may in his discretion distribute the income or accumulate it, the income is taxed to the trustee irrespective of the exercise of the discretion. The imposition of the tax is not affected by the fact that an ultimate beneficiary may be a person exempt from tax. An allowance paid a widow out of the corpus of the estate is not deductible from gross income. As an intestate's real estate does not pass to his administrator, upon a sale by the heirs, whether before or after settlement of the estate, each heir is taxed individually on any profit derived.

ART. 343. *Decedent's estate during administration.*—The "period of administration or settlement of the estate" is the period required by the executor or administrator to perform the ordinary duties pertaining to

administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. Where an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. No taxable income is realized from the passage of property to the executor or administrator on the death of the decedent, even though it may have appreciated in value since the decedent acquired it. In the event of delivery of property in kind to a legatee or distributee, no income is realized. Where, however, the executor sells property of the estate for more than its value at the death of the decedent, the excess is income, or may be capital gain, taxable to the estate. See articles 1562 and 1563.

ART. 345. *Estates and trusts taxed to beneficiaries.*—In the case of (a) a trust the income of which is distributable periodically, (b) an ordinary guardianship of a minor, and (c) an estate of a decedent before final settlement as to any income properly paid or credited as such to a beneficiary, the income is taxable directly to the beneficiary or beneficiaries. Each such beneficiary must include in his return his distributive share of the net income, even though not yet paid him, but if his taxable year is different from that of the estate or trust, then he need only include in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within his taxable

year. The regulations governing partnerships are generally applicable to such an estate or trust. See articles 331–335.

ART. 347. *Estates and trusts with income which is distributed periodically, and other income.*—In the case of an estate or trust, the income of which consists both of income to be distributed to beneficiaries periodically and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with section 219 (b) and the tax shall be imposed and paid by the fiduciary in accordance with section 219 (c), except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in section 219 (a) (4) which, pursuant to the will or trust deed, is distributable during its taxable year to the beneficiaries. Each of such beneficiaries shall include, in computing his net income, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to him during the taxable year.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

NOV 10 1932

CHARLES ELMORE CROP
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 460.

CHARLES W. ANDERSON, Collector of Internal Revenue for the Third District of New York,
Petitioner,

against

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEM G. RUBERT, as Executors of the Estate of RICHARD T. WILSON, JR., deceased,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

GEORGE E. CLEARY,
CLARK T. BROWN,
Attorneys for Respondents.

CITATIONS.

CASES: PAGE

Abell *v.* Tait, 30 F. (2d) 54, (C. C. A. 4th, certiorari denied, 279 U. S. 879) 2, 3, 5

Baltzell *v.* Mitchell, 3 F. (2d) 428 (C. C. A. 1st, certiorari denied, 268 U. S. 690) 2, 3, 4

Barton *v.* Commissioner, 5 B. T. A. 1008 9

Brewster *v.* Gage, 280 U. S. 327 (1930) 7

Brooklyn Trust Company *v.* Kernan, 108 Misc. (N. Y.) 452 (1919), unanimously affirmed 191 App. Div. 895 7

Burnet *v.* Thompson Oil and Gas Company, 283 U. S. 301 6

Codman *v.* Commissioner, 50 F. (2d) 763 (C. C. A. 1st) 3

Codman *v.* Miles, 28 F. (2d) 823 (C. C. A. 4th) 278 U. S. 654 ..... 3, 5

Collister *v.* Fassitt, 163 N. Y. 281, 286 (1900) ... 8

Cooper *v.* Reynolds, 60 F. (2d) 650 (D. C. Wyoming) 6

Hubbell *v.* Burnet, 46 F. (2d) 446 (C. C. A. 8th), certiorari denied, 283 U. S. 840 3

Kaufmann *v.* Commissioner, 44 F. (2d) 144 (C. C. A. 3rd) 3

Lahey *v.* Kortright, 132 N. Y. 450 7

Marx *v.* McGlynn, Executor, etc., *et al.*, 88 N. Y. 357 7

Merle-Smith *v.* Commissioner, 42 F. (2d) 837 (C. C. A. 2nd, certiorari denied, 282 U. S. 897) 4, 5, 6, 8, 9

Morse, *et al. v.* Morse, 85 N. Y. 53 7

PAGE

Ray *v.* Fowler, 200 App. Div. 155 (1922) 7
Roxburghe, Mary, 64 C. Cl. 223, certiorari denied, 278 U. S. 598 3
Roxburghe *v.* Burnet, 58 F. (2d) 693, certiorari denied, 286 U. S. 567 ..... 3, 5
Roxburghe *v.* United States, 64 Ct. Cl. 223 5

Scripps, Appeal of, 1 B. T. A. 491 9
Sprague, Appeal of, 8 B. T. A. 173 9

Ward *v.* Ward, 105 N. Y. 68 7
Whitcomb *v.* Blair, 25 F. (2d) 528 (App. D. C.) 3

STATUTES:

Revenue Act of 1921, Section 214 (a) 6
Revenue Act of 1921, Section 202 (a) (3) 7
Revenue Act of 1921, Section 219 (a), (c), (d) ... 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 460.

CHARLES W. ANDERSON, Collector of Internal Revenue for the Third District of New York,
Petitioner,

AGAINST

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEM G. RUBERT, as Executors of the Estate of RICHARD T. WILSON, JR., deceased,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

We have stated our position in this case in our cross petition and brief in support thereof and have there stated the facts and the nature of the controversy (No. 461).

We do not believe the case is one in which a writ of certiorari should be granted. We have asked that if a

writ of certiorari is granted on the petition of the Solicitor General a writ be granted on the cross petition and the whole case presented to the Court and the Solicitor General consents to this. (See Memorandum for the Respondent in No. 461.)

In the petition for certiorari of the Solicitor General and the brief in support thereof, it is not claimed that the decision below is in direct conflict with decisions in other Circuits but it is urged that a writ of certiorari should be granted on the ground that the decision below, in allowing a deduction to a beneficiary of any part of the loss on the sale of trust assets, conflicts *in principle* with *Abell* v. *Tait*, 30 F. (2d) 54 (C. C. A. 4th, certiorari denied 279 U. S. 879) and *Baltzell* v. *Mitchell*, 3 F. (2d) 428 (C. C. A. 1st, certiorari denied 268 U. S. 690). But in those cases the facts were essentially different from the facts in the present case and there is no conflict in principle.

In those cases, beneficiaries entitled to receive the *income* for life, and who had no interest, or, at the most, a very contingent interest, in the *corpus* of a trust were required to pay income tax on the entire amount distributed to them as income, without reduction because of losses sustained on the sale of part of the corpus of the trust. The *principle of those cases* is that the beneficiaries, *having no direct interest in the corpus of the trust*, and receiving income not affected in amount by losses or gains on sales of trust assets, were not entitled to reduce the income actually received by reason of losses on the sale of trust assets. Thus, in *Baltzell* v. *Mitchell*, *supra*, the Court said:

> "The beneficiary is not interested in the capital of the trust, but only in the income. If there are accretions to the capital, these are not distributable as income, so that the beneficiary may receive any part of them; and if there are capi-

> tal losses they cannot be made good out of the income. The capital may be depleted by such losses; but the income for that taxable year is not. It may in future years be diminished because of the diminution of the capital."

In *Abell* v. *Tait*, the Court said:

> "The amount actually distributed to the beneficiaries could not have included any part of the capital of the trust estate for any such distribution would have been contrary to the express provisions of the trust."

In the present case, the beneficiaries, unlike the beneficiaries in *Baltzell* v. *Mitchell* and *Abell* v. *Tait*, were directly interested in the capital of the trust. In fact, the beneficiaries had every present and future interest in the trust property and its income. They were not merely life tenants or tenants for years. Accretions to the property belonged to the beneficiaries and were distributable to them. Unlike *Abell* v. *Tait*, the amount actually distributed to the beneficiaries could and did include distributions of corpus.

In the other cases cited by the Solicitor General (1) it is admitted that "with the exception of the Kaufmann case [*Kaufmann* v. *Commissioner*, 44 F. (2d) 144 (C. C. A. 3rd)] it did not appear that the particular beneficiary would be entitled at any time to receive distributions of corpus * * *", (Brief in support of petition, Page 15). In the Kaufmann case the residuary estate was devised to the widow of the testator for life with the privilege of using as much of the principal

(1) *Mary Roxburghe*, 64 C. Cls. 223, certiorari denied, 278 U. S. 598; *Whitcomb* v. *Blair*, 25 F. (2d) 528 (App. D. C.); *Codman* v. *Miles*, 28 F. (2d) 823 (C. C. A. 4th), certiorari denied, 278 U. S. 654; *Hubbell* v. *Burnet*, 46 F. (2d) 446 (C. C. A 8th), certiorari denied, 283 U. S. 840; *Codman* v. *Commissioner*, 50 F. (2d) 763 (C. C. A. 1st); *Roxburghe* v. *Burnet*, 58 F. (2d) 693, certiorari denied, 286 U. S. 567. See also *Kaufmann* v. *Commissioner*, 44 F. (2d) 144 (C. C. A. 3d).

as she chose from time to time with remainder over to the testator's sons. The widow, in 1907, long prior to the taxable year in question, had made a valid gift of all her interest in the estate to the sons except the income from the real estate and her separate property. After 1907, therefore, the widow had no interest in the estate property except the right to get the income from the real estate for life. The Circuit Court of Appeals denied her a deduction for depreciation on such property, saying "The loss due to depreciation must fall upon the remaindermen". In the present case, however the beneficiaries were not only entitled to the income but *were the remaindermen, and were entitled to distributions of corpus.*

The distinction between the cases relied upon by the Solicitor General and the present case is clearly pointed out in *Merle-Smith* v. *Commissioner*, 42 F. (2d) 837 (C. C. A. 2nd, certiorari denied 282 U. S. 897). In that case, beneficiaries who had a real interest in the corpus (although not as direct and complete an interest as the beneficiaries in the present case) were allowed a deduction for depletion of the trust property. The Court distinguished *Baltzell* v. *Mitchell* as follows:

> "In the Baltzell case, supra, Mrs. Baltzell had 'a vested equitable remainder,' which was a power to dispose of the property by her will; she had no legal remainder. At bar, the trust is not for life, for it ends at the forty-fifth birthday of the petitioner Kate Fowler Merle-Smith. Margaret Fowler's ceases at the same time or sooner in the event of the death of Kate Fowler Merle-Smith. *The petitioner here has the real interest in the corpus. She possesses every important attribute of ownership.* She has a 75 per cent. interest in the income, and she suffers most by the depletion. Apart from the payments to others of a 25 per cent. interest while they live

> during the period of the trust, she is in the position of one having others manage her property." (Italics supplied.)

The Court also distinguished *Roxburghe* v. *United States*, 64 Ct. Cl. 223, cited by the Solicitor General, as follows:

> "In *Roxburghe* v. *United States*, 64 Ct. Cl. 223, the plaintiff was merely a beneficiary entitled only to income of the trust created for her life. She had no interest in the corpus."

The distinction between cases of beneficiaries entitled only to income for life and those of beneficiaries who have a direct interest in the corpus is also recognized and specifically referred to in *Codman* v. *Miles*, *supra*, and *Roxburghe* v. *Burnet*, *supra*.

The decision below, therefore, does not conflict in principle with the decisions in *Baltzell* v. *Mitchell*, *supra*, and *Abell* v. *Tait*, *supra*, and is consistent in principle with the *Merle-Smith* case.

The Solicitor General dismisses the *Merle-Smith* case with the statement that "the depletion provision merely authorizes reasonable allowance for depletion without providing to whom it shall be allowed" (p. 8 of petition). But the section providing for deductions by individuals (Section 214 (a) Revenue Act of 1921) does not specifically provide to whom any of the deductions shall be allowed. Obviously depletion is allowable as a deduction only to one who has an ownership in the property. Certainly it would not be admitted that a stranger to the property would be entitled to a deduction for depletion. The allowance is based on *ownership*, and the principle of the *Merle-Smith* case is that the allowance is to be made to the real owner of the property, even though the property may technically be

held in trust. In *Cooper* v. *Reynolds*, 60 Fed. (2d) 650 (D. C. Wyoming), it was held on the authority of the *Merle-Smith* case that the beneficiaries of a trust were entitled to deductions for depletion of the corpus. The Court said:

> "As I view the situation here presented, *the determining factor* in the matter of the validity of the tax *is as to whether the plaintiffs as beneficiaries under said trust have or have not an interest in the corpus covered by the trust.* If they have such an interest, the depletion is properly deductible and the tax is improperly assessed; while on the contrary, if they have no interest in such corpus, the depletion charged is not deductible and the taxes are proper." (Italics supplied.)

In the present case, the beneficiaries were even more clearly the real owners of the property than the beneficiaries in the *Merle-Smith* case. The loss on the sale of the trust property was in fact their loss, and, we submit, was deductible by them.

The Solicitor General urges as a further reason for granting a writ of certiorari that the decision disregards the familiar principle stated in *Burnet* v. *Thompson Oil & Gas Company*, 283 U. S. 301, and other cases, that no deduction may be allowed unless specific authority therefor is found in the statute. Section 214(a) of the Revenue Act of 1921 provides:

> "That in computing net income there shall be allowed as deductions:
>
> "* * *
>
> "(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;
>
> "(5) Losses sustained during the taxable year and not compensated for by insurance or other-

wise, if incurred in any transaction entered into for profit, though not connected with the trade or business;"

That losses are allowable on the sale or other disposition of income producing property, acquired by inheritance, is clearly recognized by the Revenue Act of 1921 and the other Revenue Acts, which specifically provide the "basis" for the determination of gain or loss on the sale of inherited property. (Section 202(a) (3) of the Revenue Act of 1921). In *Brewster* v. *Gage*, 280 U. S. 327 (1930), this Court, in determining when inherited property was "acquired", for the purpose of determining gain or loss, assumed that a loss on the sale of inherited property was an allowable deduction and no contention to the contrary seems to have been made.

The Solicitor General contends that the question in this case is one of general importance. The primary question in the case is whether or not the will of Richard T. Wilson, Sr. created any trust of his residuary real estate. If no such trust was created, then the questions raised by the petition of the Solicitor General do not arise. The Solicitor General contends that the Court below correctly construed the will of Richard T. Wilson, Sr. as creating trusts in all of his undistributed residuary estate, citing certain New York cases.(2) In some of the cases cited, the provisions of the will were similar in some respects to the provisions of the will of Richard T. Wilson, Sr. But in other cases involving provisions equally comparable it has been held that no trust was created. *Brooklyn Trust Company* v. *Kernan*, 108 Misc. (N. Y.) 452 (1919), unanimously affirmed, 191 App. Div. 895; *Ray* v. *Fowler*, 200 App. Div. 155 (1922).

---

(2) *Morse, et al.* v. *Morse*, 85 N. Y. 53; *Marx* v. *McGlynn, Executor, etc., et al*, 88 N. Y. 357; *Ward* v. *Ward*, 105 N. Y. 68; and *Lahey* v. *Kortright*, 132 N. Y. 450.

In almost every case involving the construction of a will, the court must find the intent of the testator under the particular will and under a particular set of facts. No two situations are precisely alike. As was said in *Collister* v. *Fassitt*, 163 N. Y. 281, 286 (1900):

> "It is a trite saying that no will has a brother, and it may also be said that the citation of numerous authorities, in most instances, are of little assistance to the Court, as each will must be construed in the light of peculiar surrounding circumstances, the scheme disclosed, the language employed, and the intention of the testator gathered from the general situation."

The construction of the will of Richard T. Wilson, Sr. of course is not a question of general importance. It is, however, a question which must be decided by the Court before the questions raised by the Solicitor General arise.

In so far as the case involves the deduction of losses on the sale of trust property by beneficiaries having every present and future interest in both the income and corpus of the trust, it certainly is of no greater general importance than was the *Merle-Smith* case, involving a similar problem as to depletion, which this Court refused to review (282 U. S. 897).

The Solicitor General does not discuss the decision of the Circuit Court of Appeals for the Second Circuit in this case, in which it was held that the beneficiaries were entitled to deduct a part of the loss proportionate to the part of the proceeds of the sale distributed to them during the taxable year, the position of the Solicitor General being that no deduction whatever is allowable. While we believe that the entire loss was deductible by the beneficiaries, we submit that they were at least entitled to the deduction allowed by the Circuit Court of Appeals. The taxpayer in this case

should at least be entitled to deduct a loss on the same basis as a profit would have been taxed to him.

Under Sections 219 (a) (4), 219 (c) and 219 (d) of the Revenue Act of 1921, if trust property was sold at a profit and part of the profit retained by the trustees and part distributed, the amount of the profit retained would be taxed to the trustees and the part distributed would be taxed to the beneficiaries. *Appeal of Scripps*, 1 B. T. A. 491; *Barton* v. *Commissioner*, 5 B. T. A. 1008; *Appeal of Sprague*, 8 B. T. A. 173. Where the trust property is sold at a loss, it logically follows that the beneficiaries are entitled to deduct at least that part of the loss proportionate to the part of the proceeds distributed to them within the year. This is consistent with the decision in the *Merle-Smith* case, *supra*, since there the beneficiaries were allowed to deduct the depletion related to the royalties actually distributed to them.

We respectfully submit that the writ of certiorari should be denied on the petition of the Solicitor, and if such writ is so denied, we do not ask for a writ of certiorari on our cross petition. If a writ of certiorari is granted, we request that it be granted on the cross petition as well as on the petition.

Respectfully submitted,

GEORGE E. CLEARY,
CLARK T. BROWN,
Attorneys for Respondents.

FILE COPY

Office Supreme Court, U.S.
FILED
JAN 11 1933
CHARLES ELMORE CROPLEY
CLERK

Nos. 460 and 461.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1932.

CHARLES W. ANDERSON, Collector of Internal Revenue for the Third District of New York,

Petitioner,

vs.

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEM G. RUBERT, as Executors of the Estate of RICHARD T. WILSON, JR., Deceased,

Respondents.

—o—

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEM G. RUBERT, as Executors of the Estate of RICHARD T. WILSON, JR., Deceased,

Petitioners,

vs.

CHARLES W. ANDERSON, Collector of Internal Revenue for the Third District of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for Marian Steedman Wilson, *et al.*, as Executors of the Estate of Richard T. Wilson, Jr., Deceased.

GEORGE E. CLEARY,
CLARK T. BROWN,
Counsel for Respondents in No. 460 and for Petitioners in No. 461.

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement of the Case	3
Specification of Errors to be Urged	8
Summary of Argument	8
Argument	12
1.—The five children of Richard T. Wilson, Sr. became the owners of his residuary real estate at his death and the taxpayer was entitled to deduct his share of the loss resulting from the sale of part of such real estate in 1922	12
(a) Any trust of the remaining residuary estate created by the will of Richard T. Wilson, Sr. was a trust to sell and distribute in which the beneficiaries had such direct and complete ownership of the corpus that they were entitled to deduct from their individual incomes losses sustained on the sale of such corpus	13
(b) There was in fact no trust of the residuary real estate so that the taxpayer was the legal as well as the beneficial owner of a one-fifth interest in the property sold	24

PAGE

II.—The taxpayer is at least entitled to deduct for 1922 a part of the loss on the sale of the Commercial Building proportionate to the part of the proceeds of such sale distributed to him in that year, as the Circuit Court of Appeals held 29

Conclusion 31
Appendix 32

CITATIONS.

Cases:

Abeles, Estate of Frances, 24 B. T. A. 435 30
Abell *v.* Tait, 30 F. (2d) 54, cert. den. 279 U. S. 849 .....9, 16,17, 18
Abell *et al*, Elizabeth M. 4 B. T. A. 87 17
Alphin *v.* Commissioner, 21 B. T. A. 1101 .... 15, 16
Altmayer *v.* Commissioner, 10 B. T. A. 1091 .. 12
Arrott *v.* Commissioner, 23 B. T. A. 478 16

Baltzell *v.* Mitchell, 3 F. (2d) 428, cert. den. 268 U. S. 690 .....9, 16, 17, 18
Barton *v.* Commissioner, 5 B. T. A. 1008, aff. 26 F. (2d) 765 29
Beaver *v.* Beaver, 117 N. Y. 421 25
Brewster *v.* Gage, 280 U. S. 327 9, 11,12, 13, 14, 28, 29, 30
Brooklyn Trust Co. *v.* Kernan, 108 Misc. (N. Y.) 452, aff. 191 App. Div. 895 .....11, 26, 27
Busch *v.* Commissioner, 50 F. (2d) 800 .... 10, 22
Butterfield, Matter of, 133 N. Y. 473 28

Callahan, Matter of, 96 Misc. (N. Y.) 74 aff. 176 App. Div. 906, aff. 200 N. Y. 59 26
Codman *v.* Commissioner, 50 F. (2d) 763 18
Codman *v.* Miles, 28 F. (2d) 823, cert. den. 278 U. S. 654 18

PAGE

Colton *v.* Colton, 127 U. S. 300 24
Commissioner *v.* Molter, 60 F. (2d) 498 15
Cooper *v.* Reynolds, 60 F. (2d) 650 15
Crocker *v.* Nichols, 27 F. (2d) 598 29

DeForest, Appeal of Julia N., 4 B. T. A. 1059 ... 16

Falk *et al v.* Commissioner, 24 B. T. A. 299 ... 19
Field *v.* Gilchrist, People *ex rel.*, 240 N. Y. 301.. 10, 22
Francis *v.* Commissioner, 15 B. T. A. 1332 16
Freeman *v.* Coit, 96 N. Y. 63 25

Heermans *v.* Burt, 78 N. Y. 259 27
Heiner *v.* Tindle, 276 U. S. 582 12
Henderson *v.* Henderson, 113 N. Y. 1 27
Hubbell *v.* Burnet, 46 F. (2d) 446, cert. den. 283
U. S. 840 18

Kaufmann *v.* Commissioner, 44 F. (2d) 144 18
Kuhn *v.* Commissioner, 24 B. T. A. 216 15

Lederer *v.* Stockton, 260 U. S. 3 23
Lehmann *v.* Commissioner, 21 B. T. A. 664 29

Merle-Smith *v.* Commissioner, 42 F. (2d) 837,
cert. den. 282 U. S. 897 9, 11, 14, 16, 18, 23, 30
Morse *v.* Morse, 85 N. Y. 53 27
Munger *v.* Commissioner, 16 B. T. A. 168 16

Post *v.* Hover, 33 N. Y. 593 25
Pringle, Marian B. *v.* Commissioner, 26 B. T. A.
362 30

Ray *v.* Fowler, 200 App. Div. 155 27
Roxburghe *v.* Burnet, 58 F. (2d) 693, cert. den.
286 U. S. 567 18
Roxburghe *v.* U. S., 64 Ct. Cl. 223, cert. den.
278 U. S. 598 18

PAGE

Sprague, Appeal of Elizabeth F., 8 B. T. A. 173 29

U. S. *v.* Ludey, 274 U. S. 295 15

Whitcomb *v.* Blair, 25 F. (2d) 528 18
Willcuts *v.* Ordway, 19 F. (2d) 917 29
Williams, Appeal of, 1 B. T. A. 1101 13

Statutes:

Judicial Code, Section 240(a), as amended ... 2
New York Real Property Law
Section 96 ..... 25, 26
Section 97 .....7, 11, 25, 26, 28
Revenue Act of 1921
Section 202(a)(3) 12
Section 214(a)(5) 8, 12, 14,16
Section 214(a)10 16
Section 218 ..... 10, 22
Section 219 ..... 10, 20
Paragraph (a) 10, 14, 22, 29
Paragraph (c) 29
Paragraph (d) 10, 14, 21, 22, 29

Miscellaneous:

Chaplin on Suspension of the Power of Alienation 28
G. C. M. 6811, IX-1 C. B. 136 12
G. C. M. 10273 XI-11 C. B. 3 15
O. 1013, 2 C. B. 181 ..... 10, 19
Regulations 62
Article 332 ..... 10, 21
Article 342 29
Article 345 ..... 10, 21
T. B. R. 35, 1 C. B. 122 12

Nos. 460 and 461.

IN THE

Supreme Court of the United States

OCTOBER TERM—1932.

CHARLES W. ANDERSON, Collector of Internal Revenue for the Third District of New York,

Petitioner,

vs.

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEM G. RUBERT, as Executors of the Estate of RICHARD T. WILSON, JR., Deceased,

Respondents.

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEM G. RUBERT, as Executors of the Estate of RICHARD T. WILSON, JR., Deceased,

Petitioners,

vs.

CHARLES W. ANDERSON, Collector of Internal Revenue for the Third District of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for Marian Steedman Wilson, *et al.*, as Executors of the Estate of Richard T. Wilson, Jr., Deceased.

Opinions Below.

The Circuit Court of Appeals reversed the judgment of the District Court with opinion (R. 48) which is reported in 60 F. (2d) 52. The opinion of the District Court (R. 40) is reported in 51 F. (2d) 268.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 18, 1932 (R. 53). Both parties filed petitions for writs of certiorari on October 18, 1932. Both petitions were granted on November 21, 1932 (R. 54). The jurisdiction of this court rests upon Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

The case involves the right of Mr. Richard T. Wilson, Jr., now deceased (referred to as the taxpayer), to deduct from his 1922 income all or any part of a loss of $22,660, which was one-fifth of the loss on a sale in 1922 of certain residuary real estate in which the taxpayer and his four brothers and sisters had inherited equal interests under the will of their father, Richard T. Wilson, Sr. The Collector claims that the residuary estate was left in trust and that the loss is deductible only by the Executors as Trustees. The taxpayer claims, (1) even if such real estate was technically held in trust, the five children owned every present and future interest in the property, the income from it and the proceeds of any sales, and the taxpayer was entitled to deduct from his personal income his share of the loss which he actually suffered, notwithstanding the existence of the trust, as the District Court held; (2) under the will of Richard T. Wilson, Sr. this real estate was not in fact devised in trust to his executors and the taxpayer, as the legal and equitable owner of a one-fifth interest in the real estate, was entitled to deduct his share of the loss from his personal income; (3) if the taxpayer is not entitled to deduct the full amount of his loss, he is entitled to deduct

a part of such loss proportionate to the part of the selling price of the property distributed to him by the executors in 1922, as the Circuit Court of Appeals held.

Statutes Involved.

The statutes involved are set forth in the appendix (*infra, pages* 32 to 35).

Statement of the Case.

This suit was instituted in the District Court for the Southern District of New York by Richard T. Wilson, Jr., and upon his death his executors were substituted as plaintiffs (R. 27). The case was decided by the District Court under a stipulation of facts, upon which findings of fact were based. (R. 27-36).

Richard T. Wilson, Sr., the taxpayer's father, died testate in 1910, a resident of New York, leaving a net estate of approximately $16,000,000, of which $2,300,000 was real estate. Under the will (R. 28-32) all of his property was left to his five children, partly in trust, and partly by absolute gift. Prior to 1913 all of the express trusts had been established out of personal property. (R. 34). Prior to 1922 the debts had been paid and all of the estate had been distributed by his executors, partly in cash and partly in securities, except the Commercial Building (a New York office building), other real estate worth approximately $41,000 and personal property worth approximately $150,000 (R. 34-35). In 1922 the executors of the estate of Richard T. Wilson, Sr. were the taxpayer, his brother Marshall Orme Wilson, and the latter's son R. Thornton Wilson (R. 33).

In 1922 the Commercial Building was sold for $165,000 by such executors at an admitted loss of $113,300, based upon its value of $290,000 when inherited and on

March 1, 1913, after deducting depreciation. (R. 35). The record does not show the form in which the consideration was received. Exclusive of this item the executors' income in 1922 was $5.84 less than their expenses (R. 35). The executors distributed $50,000 in cash to the five residuary legatees in 1922 (R. 34) but the record does not show whether or not this sum was all or part of any cash consideration received on the sale of the Commercial Building.

The loss of $22,660 claimed by the taxpayer herein, one of the five children, is one-fifth of the said loss of $113,300.

The Commercial Building was part of the residuary estate passing absolutely to the five children under Article Fourth of the Will (R. 28, fols. 62-63) which reads as follows:

> "All the rest, residue and remainder of my property, real, personal and of every kind and description, which I shall own at the time of my death, I direct my executors, hereinafter named to sell and convert into personalty, and to divide the proceeds thereof into five equal parts which I give and bequeath as follows:
>
> "(1) To my son Marshall Orme Wilson, one of such parts to be his absolutely.
>
> "(2) To my daughter Mary R. Goelet, one of such parts to be hers absolutely.
>
> "(3) One of such parts to the amount of Five Hundred Thousand Dollars I direct to be added to the trust fund of Five hundred thousand dollars created in and by the foregoing Third Article of this will for the benefit of my son Richard T. Wilson, Jr. and to be subject to the provisions of said Third Article both as to the income therefrom and the disposition of the principal thereof, as if a part of said original trust fund; *and the balance of such part I give and bequeath to my said son Richard T. Wilson, Jr. to be his absolutely.*" (Italics supplied).

Sub-paragraphs (4) and (5) of Article Fourth made provisions for two other children identical with those of sub-paragraph (3) for the taxpayer

The Commercial Building was not used in the cases of three of the children, to increase the express trusts created by Article Third which were created out of personal property, (R. 34) but was part of the balance of the residuary estate which passed to the five children to be theirs absolutely.

The will, after providing for the payment of debts and a trust fund for the widow (which never became effective because of her prior death, R. 33, fol. 72), provided in Article Third for five separate trust funds of $500,000 each for the testator's five children, and by Article Fourth three of these were increased by $500,000 each out of the particular beneficiaries' share of the residuary estate, resulting in two trusts of $500,000 each and three trusts of $1,000,000 each, a total of $4,000,000 out of the net estate of $16,000,000. These trust funds were bequeathed to the Union Trust Company of New York as trustee (R. 28, fol. 61-62).

There is no bequest or devise of the residuary estate to the executors. That was to be sold and the proceeds were given absolutely to the five children (except for the additions to the express trusts). There is no indication of any intention to create any trusts other than the express trusts set up with Union Trust Company as trustee. The executors are nowhere in the will referred to as trustees. The Union Trust Company is referred to in Article Sixth as "trustee of the trusts hereinbefore created" (R. 31, fol. 68) and in Article Ninth as "trustee of the trusts under this will." (R. 32, fol. 70).

The will gives the executors certain powers with respect to the residuary estate pending its sale and distribution. It is these powers which give rise to the

question as to whether a trust of the residuary estate must be implied. The provisions are as follows:

> "As the balance of my residuary estate [after the trust funds have been set up] will largely consist of real estate in this and other States and shares of manufacturing and business corporations which should not be sold excepting under favorable conditions, I direct my said Executors to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding however a period longer than the lives of my sons, Marshall Orme Wilson and Richard T. Wilson, Jr., and the survivor of them, and I hereby authorize and empower my said executors within said period, to sell, convey, assign and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment therefor * * *." (R. 30, fol. 65).

The will then provided that:

> "Upon any sale or disposition being made by my said executors of such portion of my residuary estate, or of any part thereof, or of the shares of the corporation which they are hereinbefore authorized to incorporate, or any part thereof, I authorize and empower my said executors, if the proceeds, or any part thereof, may in their judgment be distributed among the persons entitled thereto hereunder without any detriment to their interests to so distribute them forthwith; or in their discretion to retain the same, or any part thereof, for further conversion before distribution, not, however, beyond the period of the lives of my said sons ant the survivor of them.
>
> "During the period that my said executors shall hold such portion of my residuary estate or the shares of the corporation which they are hereinbefore authorized to incorporate, or any

> part thereof, they shall semi-annually pay over the net income thereof, or of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed in and by the foregoing fourth article in the proportion of their respective interests." (R. 30-31, fols. 66-67).

These provisions contemplate the holding of the residuary property by the executors for advantageous sale, the distribution of all income in the meantime to the residuary legatees and the prompt distribution of the proceeds of sale, unless requiring further conversion. They do not contemplate reinvestment of the proceeds of sales if received in form suitable for distribution, as they contain no powers or directions as to reinvestments, but only provisions for "further conversion before distribution." In contrast to this, detailed powers as to reinvestment are given the trustee of the express trusts (R. 31, fol. 68).

Although these powers are limited in duration to two lives in being, there is no gift over of any remainder interests at the termination of such lives, the entire interest in the residue (except for the additions to the express trusts) being given to the five children absolutely by Article Fourth of the will. Although power to receive the rents and profits is essential to the existence of a valid trust, (Sec. 97 New York Real Property Law) the will does not expressly give such a power to the executors.

The will also gave the executors a power (never used, R. 35, fol. 76) of putting portions of the residuary estate in a corporation and holding the stock until it could be advantageously sold (R. 30, fol. 65).

Both courts below held that a trust of the residuary estate must be implied but that the taxpayer was nevertheless entitled to a deduction. The District Court

allowed the full deduction of $22,660 claimed (R. 36). The Circuit Court of Appeals held that the taxpayer was entitled to deduct a part of the loss proportionate to the part of the selling price distributed to him in 1922, and reversed for new trial. If it appears on such trial that the $50,000 distributed in 1922 was part of the selling price of the Commercial Building, the taxpayer will be entitled under that decision to deduct one-fifth of 50,000/165,000 of the loss of $113,300 or $6,866.66 (R. 53).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In holding that the will of Richard T. Wilson, Sr., created a trust with respect to his remaining residuary estate.

2. In not holding that, even though a trust was created with respect to the remaining residuary estate, the taxpayer was entitled to deduct from his income his full share of the loss on the sale of the Commercial Building.

3. In reversing the judgment of the District Court.

Summary of Argument.

The taxpayer is entitled to deduct from 1922 income his share of the loss on the sale of the Commercial Building because he was for every practical purpose the owner of a one-fifth interest in this property. The loss is deductible under section 214 (a) (5), Revenue Act of 1921, allowing individuals to deduct losses incurred in transactions entered into for profit, which clearly applies to losses on the sale of inherited property of a business or investment character.

Even if there was a technical trust of the residuary estate of Richard T. Wilson, Sr., including this property, which we deny, such trust was one to sell and distribute the proceeds, the termination of which would not change any beneficial interest in the property; it was a trust in which the beneficiaries were vested with complete ownership of every present and future interest in the property, were entitled to the distribution of all the income and were taxable thereon, and were entitled to distribution of the proceeds of all sales either forthwith or after further conversion by the executors. Such beneficiaries acquired their interests in such trust upon the death of Richard T. Wilson, Sr., were enriched by the value of the property at that time (*Brewster* v. *Gage*, 280 U. S. 327) and actually sustained the loss when the property was later sold for a smaller amount. This position is supported by *Merle-Smith* v. *Commissioner*, 42 F. (2d) 837, certiorari denied 282 U. S. 897, where the beneficiary of a trust, entitled to 75% of the net income and to the corpus at a specified age, was allowed a deduction for depletion of the mining property held in trust because the court regarded the beneficiary as the real owner of the trust property and the person who suffered the depletion.

The cases of *Abell* v. *Tait*, 30 F. (2d) 54, certiorari denied 279 U. S. 849, and *Baltzell* v. *Mitchell*, 3 F. (2d) 428, certiorari denied 268 U. S. 690, and any cases involving beneficiaries having only life interests, are not inconsistent in principle with the taxpayer's contention. In those cases the beneficiaries could never personally receive any of the corpus, having only life interests, or could personally receive the corpus only if they survived at the termination of specified lives. Such beneficiaries had no immediate interest in the corpus and were not personally affected by losses or gains on the sales of the corpus. In the case at bar, however, the benefici-

aries personally owned every interest in the corpus, their possession was not necessarily postponed until any one's death, and losses or gains on sales of the corpus directly affected the amounts distributable to them forthwith or after further conversion by the executors. The vital distinction between cases where the present beneficiary had every beneficial interest in the property and cases where the remaindermen were others than the present beneficiaries was early noted by the Bureau of Internal Revenue in O. 1013, 2 CB 181, 186 (1920) and has been given effect by the Board of Tax Appeals and the Courts.

The fact that section 219 of the Revenue Act of 1921 makes estates and trusts separate taxpayers under certain circumstances is not decisive because trusts, the entire income of which is distributable, are not taxpayers, such income being taxable to the beneficiary. In such cases, particularly where every present and future interest in the property is vested in the beneficiaries, the statute requiring each beneficiary to pay income tax on his distributive share of the income of the estate or trust (section 219 (d)) should be construed to permit him to deduct his share of any net loss of the estate or trust, just as the similar statute with respect to partnerships (section 218) is so construed. Articles 345 and 332, Regulations 62; *People ex rel., Field* v. *Gilchrist,* 240 N. Y. 301. The assertion in *Busch* v. *Commissioner,* 50 F. (2d) 800 that Section 219 of the Revenue Act of 1921, makes every fiduciary a taxpayer, is not sound as applied to trusts falling within paragraph (4) of Section 219 (a).

In fact, no trust of the residuary estate of Richard T. Wilson, Sr., was created; the five children became the legal, as well as the beneficial, owners of the residuary real estate, subject to a power of sale in the executors, and may deduct the loss on the sale of their

property. The testator did not intend to create any trusts, other than those expressly provided for, and gave the proceeds of the residuary estate to his five children to be theirs absolutely. No trust is necessarily implied from the powers given the executors to hold and manage the residuary estate pending sale, to distribute the income and, in their discretion, to retain proceeds of sale for further conversion or create a holding corporation. Any implied power to receive the rents and profits was not one of the objects and purposes of the will but merely incidental to the power of sale and hence no valid trust was created, but merely a power of sale. Section 97, New York Real Property Law; *Brooklyn Trust Company* v. *Kernan*, 108 Misc. (New York) 452, affirmed 191 App. Div. 895.

If the taxpayer is not entitled to deduct his full share of the loss, he is at least entitled to deduct a part of such loss proportionate to the part of the proceeds of the sale actually distributed to him in 1922, as the Circuit Court of Appeals held. If the property had been sold at a gain and his share of the gain had been distributed to him he would have been taxable on the gain. (Section 219 (d)). If the property had been distributed to him in kind and sold by him the same amount of loss or gain would have been reflected in his personal return (*Brewster* v. *Gage*, 280 U. S. 327). To the extent that the taxpayer actually received in 1922 part of the proceeds of a sale of the corpus, the loss attributable to such proceeds should be deductible by him just as distributed gains would be taxable to him. His capital investment in the property, that is its value when acquired by inheritance, should be taken into account in his return to the extent that the proceeds of a sale are actually distributed to him in that year, whether the sale resulted in a loss or gain. Cf. concurring opinion in *Merle-Smith* v. *Commissioner*, 42 F. (2d) 837.

ARGUMENT.

I.

The five children of Richard T. Wilson, Sr., became the owners of his residuary real estate at his death and the taxpayer was entitled to deduct his share of the loss resulting from the sale of part of such real estate in 1922.

The taxpayer claims the right to deduct one-fifth of the admitted loss on the sale in 1922 of the six-story office building in New York City, known as the Commercial Building, on the ground that he was for every practical purpose the owner of a one-fifth interest in such building and personally sustained such loss.

The deduction is claimed under section 214(a) (5) of the Revenue Act of 1921 (see Appendix, page 32) as a loss incurred in a transaction entered into for profit. It is clear that losses on the sale of inherited business property are deductible under this provision. *Brewster* v. *Gage*, 280 U. S. 327 (1930). Section 202 (a) (3) of the Revenue Act of 1921 specifically provides the basis for loss or gain on the sale of property acquired by inheritance. This undoubtedly was intended to apply in cases of losses by individuals on the sale of inherited property of an investment or business character, such as stocks, bonds, and business real estate. The Bureau of Internal Revenue and the Board of Tax Appeals have always allowed such losses to be deducted. *T. B. R. 35*, 1. C. B. 122 (1919); *G. C. M. 6811*, IX-1 C. B. 136; *Altmayer* v. *Commissioner*, 10 B. T. A. 1091. In *Heiner* v. *Tindle*, 276 U. S. 582, this court gave a broad construction to the phrase "in any transaction entered into for profit" and stated that the right to deduct losses on sales of inherited property under this pro-

vision was not questioned. Controversy has arisen only where the inherited property may have been acquired for personal use as in the case of a residence. *Appeal of Williams,* 1 B. T. A. 1101. The Commercial Building, here in question, was business property producing rental income distributable to and taxable to the five children.

The only question is whether the taxpayer's interest in this property was sufficiently direct and complete to entitle him to deduct the loss from his individual income. If, as we maintain, the taxpayer was the substantial owner of a one-fifth interest in the Commercial Building, his inherited capital, acquired upon his father's death, was invested in the building and he suffered a loss when the building was later sold for a smaller amount, and, as is generally true with respect to inherited property of a business or investment character, such loss is deductible by him as a loss sustained in a transaction entered into for profit. The contention that the taxpayer had no interest in the Commercial Building because the executors were directed to sell it and distribute the proceeds to the five children is wholly inconsistent with the actual situation. All of the debts had been paid, and the five children had every real interest in the few assets remaining in the residuary estate. A similar contention was rejected by the court in *Brewster* v. *Gage,* 280 U. S. 327.

(a) *Any trust of the remaining residuary estate created by the will of Richard T. Wilson, Sr., was a trust to sell and distribute in which the beneficiaries had such direct and complete ownership of the corpus that they were entitled to deduct from their individual incomes losses sustained on the sale of such corpus.*

Assuming, contrary to our contention (see p. 24 below) that a trust of the residuary estate was created, it was one to sell and distribute the proceeds, the bene-

ficiaries had the direct and complete ownership of the corpus, were entitled to current distribution of all of the net income and of the proceeds of all sales immediately or after further conversion by the executors. In such a trust, the losses sustained on the sale of trust assets are actually sustained by the beneficiaries and are deductible by them under Section 214(a) (5) Revenue Act of 1921. The District Court so held. (R. 44).

The decisive consideration is that the five beneficiaries of the trust, if one existed, personally owned every present and future interest in the trust property and its income. There were no other remaindermen, contingent or otherwise. Their ownership was vested, complete and exclusive. Their posession was not postponed until the termination of any life. Most of the original corpus had already been distributed to them, partly in cash and partly in securities. They acquired their interests on the death of Richard T. Wilson, Sr., and were then enriched by the value of the property. (*Brewster* v. *Gage, supra.*) Any loss on the sale of the corpus was a direct loss to them, and directly affected the amounts distributable to them forthwith or after further conversion by the executors. The income, being currently distributable, was taxable to them under sections 219(a) (4) and 219(d) of the Revenue Act of 1921 (see appendix, pages 32 and 33). The beneficiaries possessed every substantial attribute of ownership and the losses suffered on the sale of the corpus were their losses, the entire burden of which fell directly upon them.

Direct support for the taxpayer's position is found in *Merle-Smith* v. *Commissioner,* 42 F. (2d) 837, certiorari denied 282 U. S. 897, where the Circuit Court of Appeals for the Second Circuit sustained the right of trust beneficiaries receiving royalties, to

a deduction for depletion of the mining property held in the trust. In that case the beneficiary was entitled to receive 75% of the net annual income of the trust, and to receive the corpus when she reached the age of 45 years, with power to dispose of the property by will in case of earlier death. The Court allowed the beneficiary depletion with respect to the trust property on the ground that she was the real owner of such property. The Court said:

> "The petitioner here has the real interest in the corpus. She possesses every important attribute of ownership. She has a 75% interest in the income and she suffers most by the depletion. Apart from the payments to others of a 25% interest while they live during the period of the trust she is in the position of one having others manage her property."

This decision is generally followed and is accepted by the government.

> *Alphin* v. *Commissioner*, 21 B. T. A. 1101.
> *Kuhn* v. *Commissioner*, 24 B. T. A. 216.
> *Cooper* v. *Reynolds*, 60 F. (2d) 650.
> *G. C. M. 10273*, Internal Revenue Cumulative Bulletin, XI-11, p. 3.
> Cf. *Commissioner* v. *Molter*, 60 F. (2d) 498.

This decision can not be distinguished on the ground that it involved a deduction for depletion rather than a deduction for losses. In *United States* v. *Ludey*, 274 U. S. 295 (1927), the Court treated the exhaustion of mining property or the wearing-out of a plant as a gradual sale of the property and indicated that the theory underlying the allowance for depletion and depreciation is the same as the theory allowing cost to be applied against the selling price in the case of a sale. Depletion is allowed under the

statute to the person who suffers depletion of his property, (section 214(a) (10) Revenue Act of 1921) just as losses are allowed to the persons who suffer losses on the sale of their property. (Section 214(a) (5) Revenue Act of 1921.) Neither deduction could be allowed to a taxpayer who had no interest in the property subject to depletion or loss.

In the case at bar the five children possessed every important attribute of ownership of the trust property. They were directly interested in all of the income and all of the proceeds of sale and they sustained the loss in question. The *Merle-Smith* case shows that that existence of the trust is no bar to the recognition of these facts.

Decisions of the Board of Tax Appeals recognizing the right of beneficiaries of a trust to deduct losses, depreciation or depletion with respect to trust property, where the beneficiaries were also remaindermen and the termination of the trust would not affect the beneficial ownership of the property, are as follows:

Appeal of Julia N. DeForest, 4 B. T. A. 1059.
Munger v. *Commissioner*, 16 B. T. A. 168.
Francis v. *Commissioner*, 15 B. T. A. 1332.
Alphin v. *Commissioner*, 21 B. T. A. 1101.
Arrott v. *Commissioner*, 23 B. T. A. 478, 488.

The cases of *Abell* v. *Tait*, 30 F. (2d) 54 (C. C. A. 4th, certiorari denied 279 U. S. 849), and *Baltzell* v. *Mitchell*, 3 F. (2d) 428 (C. C. A. 1st, certiorari denied 268 U. S. 690), are not inconsistent in principle with the taxpayer's contention. In neither of those cases could the proceeds of sales be distributed to the beneficiaries prior to the termination of specified lives. In *Baltzell* v. *Mitchell*, *supra*, the property had to be held in trust until the deaths of the beneficiaries there involved. In *Abell* v. *Tait*, *supra*, as appears from the

copy of the will set forth in *Elizabeth M. Abell, et al.*, 4 B. T. A. 87, the property had to be held in trust until the death of Elizabeth Maxwell Abell, the wife; the daughter's share, if she survived, was to be held in trust for her life; and the two sons would personally receive a share of the corpus only if they survived their mother. In those cases the beneficiaries had no immediate interest in the corpus of the trust, the amount of income or distributions which they received was not affected by losses or gains on the sale of trust assets, and they were not substantially the present owners of the trust properties. It was for this reason that it was held in those cases that the life beneficiaries of the trusts were not entitled to deduct losses on the sale of trust assets. Thus in *Baltzell* v. *Mitchell, supra,* the Court said:

> "The beneficiary is not interested in the capital of the trust, but only in the income. If there are accretions to the capital, these are not distributable as income, so that the beneficiary may receive any part of them; and if there are capital losses they can not be made good out of the income. The capital may be depleted by such losses; but the income for that taxable year is not. It may in future years be diminished because of the diminution of the capital."

In *Abell* v. *Tait, supra,* the Court said:

> "The amount actually distributed to the beneficiaries could not have included any part of the capital of the trust estate for any such distribution would have been contrary to the express provisions of the trust."

Even though Mrs. Baltzell had an equitable vested remainder and the two sons of Mr. Abell would receive shares in the corpus if they survived their mother, it is nevertheless true in both the *Baltzell*

and *Abell* cases that the beneficiaries had no immediate interest in the corpus, and that no part of the corpus could be distributed until the end of the designated lives.

The other cases cited by the Solicitor General in his petition for certiorari in No. 460 at pages 14 and 15* all involved life beneficiaries, having no personal interest in the remainder. In all of those cases it was clear that the beneficiary could never receive any distributions of corpus. In these cases the Courts relied very strongly on the fact that they were dealing with life beneficiaries having no interest in the remainder.

The disinction between this line of cases and the present case is clearly pointed out in *Merle-Smith* v. *Commissioner, supra,* where the court distinguishes *Baltzell* v. *Mitchell,* as follows:

> "In the *Baltzell* case, *supra,* Mrs. Baltzell had 'a vested equitable remainder,' which was a power to dispose of the property by her will; she had no legal remainder. At bar the trust is not for life, for it ends at the forty-fifth birthday of the petitioner Kate Fowler Merle-Smith. Margaret Fowler's ceases at the same time or sooner in the event of the death of Kate Fowler Merle-Smith. The petitioner here has the real interest in the corpus. She possesses every important attribute of ownership."

In the same case the court distinguishes *Roxburghe* v. *U. S.,* 64 Ct. of Cl. 223, as follows:

> "In *Roxburghe* v. *United States,* 64 Ct. of Cl. 223, the plaintiff was merely a beneficiary entitled only to income of the trust created for her life. She had no interest in the corpus."

**Roxburghe* v. *United States,* 64 Ct. of Cls. 223, certiorari denied 278 U. S. 598; *Whitcomb* v. *Blair,* 25 F. (2d) 528; *Codman* v. *Miles,* 28 F. (2d) 823 certiorari denied 278 U. S. 654; *Hubbell* v. *Burnet,* 46 F. (2d) 446, certiorari denied 283 U. S. 840; *Codman* v. *Commissioner,* 50 F. (2d) 763; *Roxburghe* v. *Burnet,* 58 F. (2d) 693, certiorari denied 286 U. S. 567; *Kaufmann* v. *Commissioner,* 44 F. (2d) 144.

The Board of Tax Appeals has likewise recognized the vital distinction between a case in which the beneficiary has an interest in the corpus and a case in which the beneficiary has only an interest in the income. See *Falk, et al., executors* v. *Commissioner,* 24 B. T. A. 299, 303.

This basic distinction was clearly recognized by the Bureau of Internal Revenue in the early ruling made in *O. 1013,* 2 C. B. page 181 (1920). In that case the Solicitor of Internal Revenue in Case III at page 184, held that life beneficiaries could not deduct from their distributive share of the net income of a trust, losses on the sale of corpus because the burden of such losses did not fall on the life tenants, but on the remaindermen. At page 186, however, the Solicitor says:

> "This reasoning is not applicable where the estate or trust does not represent different interests and is susceptible of treatment as a unit. So property left in trust for an incompetent, or *property left in trust in which the present beneficiary has the entire beneficial interest,* could at least in cases (II), (III) and (IV) be treated as a unit *and should be so treated.*" (Italics supplied).

Since case III referred to was the case of losses on the sale of corpus, this is a clear holding that a beneficiary of a trust who has the entire beneficial interest in the corpus should be allowed the benefit of losses on the sale of corpus, which is the taxpayers position in this case. This ruling recognized that such a beneficiary is on the same basis as an incompetent whose property is held by trustees or a ward whose property is held by a guardian, that the beneficiary is the real taxpayer and the real owner of the property in such a case and hence entitled to the benefit of losses on the sale of his property. In view of

this ruling it cannot be maintained that there has been a consistent administrative practice denying the benefit of losses of corpus to a beneficiary of a trust who has the entire beneficial interest in the property held in trust.

The simple fact is that a life beneficiary does not bear or sustain the loss on a sale of the corpus because it does not affect the income distributable to him, but primarily affects the remainderman. Hence in many cases the Bureau of Internal Revenue and the Courts have denied such deductions to a life beneficiary. But where the present beneficiary is also the remainderman he does directly bear the loss and it does affect him. This vital difference has not always been clearly recognized, but it is a substantial fact which should not be disregarded. This fact makes the life beneficiary cases wholly inapplicable.

The present case does not involve life beneficiaries. Here, the beneficiaries beneficially owned every present and future interest in the trust property, its income and proceeds of sales. The amounts distributed to the beneficiaries could and did include distributions of corpus and gains on the sale of corpus, most of the corpus had already been distributed, and the executors could have distributed the entire remaining corpus in that year.

The question is not settled by general statements that trusts are separate taxpaying entities under Section 219 of the Revenue Act of 1921. It is true that under Section 219 many trusts are taxpayers separate and distinct from the beneficiaries. This is true of an estate in process of administration, where the income is not currently distributable (paragraph 1), where the beneficiary of a trust is unborn or unascertained or has a contingent interest (paragraph 2) or where the income is held for future distribution (paragraph 3). *This is not true, however, where all of the in-*

come of an estate or trust is to be distributed to the beneficiaries periodically (*paragraph 4*). In such cases where the owner of the income is definitely known, the fiduciary is not made a taxable entity. In such cases the fiduciary is not a taxpayer and all the income is taxable to the beneficiaries (Section 219(d)). Such fiduciaries are put on the same basis as a guardian of an infant, they merely represent a definite, ascertained, present owner. This is recognized by Article 345 of Regulations 62, which provides among other things:

> "The regulations governing partnerships are generally applicable to such an estate or trust."

Partnerships of course are not separate taxpayers under the Revenue Act of 1921 (Section 218). In this class of cases the fiduciary merely files an information return for the purpose of showing the income taxable to the beneficiary. If such a return shows a net loss, the beneficiary should be allowed to deduct his share of such loss, just as a partner is allowed to deduct his share of a partnership loss (Article 332, Regulations 62) although the statute with respect to partnerships is silent as to losses (Section 219). In the case at bar the will specifically provides in Article Fifth (R. 31, fol. 67) that the executors shall "semi-annually pay over the net income thereof, or of such parts thereof as may be unsold or undistributed, to the persons to whom my residuary estate is bequeathed." And even the proceeds of sales are to be distributed unless the executors decide in their discretion to retain the same or a part thereof for further conversion. In 1922, although the executors' expenses exceeded their income, they nevertheless distributed $50,000. (R. 34). There were no undistributed gains. In 1922 this trust was not a taxpayer or a taxable entity.

This view is squarely supported by the decision in *People ex rel. Field* v. *Gilchrist*, 240 N. Y. 301 (1925), in which the New York income tax law, very similar in its provisions to the federal income tax law, was construed to permit the beneficiary of a trust to deduct from her personal income real estate taxes paid by the trustee on trust property, such taxes being paid out of trust income exempt from tax. The court recognized that in such a case the burden of the tax fell on the beneficiary and that a refusal to allow such deduction to the beneficiary would be "a straining of the law to read into it a meaning inconsistent with reality." The court relied on the state regulations, which followed the federal regulations in providing that the regulations as to partnerships should apply to trusts, where the income was periodically distributable.

The decision in *Busch* v. *Commissioner*, 50 F. (2d) 800 completely disregards the fact that the statute does not make a trust falling under paragraph (4) of Section 219(a) (in which all the income is distributable to the beneficiaries), a separate taxpayer. In such a trust "the tax shall not be paid by the fiduciary" but only by the beneficiary (Section 219(d)). This provision is wholly comparable to the provision that "individuals carrying on business in partnership shall be liable for income tax only in their individual capacity" (Section 218). Such a trust is no more a taxable entity than is a partnership. The broad assertion that Section 219 makes estates and trusts separate taxpayers, is not sound as applied to cases falling within paragraph (4) of Section 219(a).

The result may be different where the trust is not one to sell and distribute the proceeds and where there is a difference in the immediate interests in current income and in the losses and gains on the sale of corpus. But in a case such as this, where there is no diversity

of interest and the beneficiaries are to receive personally both the income and the proceeds of sales, the existence of the trust should not have the effect of denying to the beneficiaries the losses which they have actually sustained, any more than the existence of the trust in the *Merle-Smith* case had the effect of denying to the beneficiary of the trust a depletion deduction which she had actually suffered.

This court has recognized that the technical existence of a trust should not serve to obscure the facts. In *Lederer* v. *Stockton* (1922) 260 U. S. 3, a charitable corporation had the remainder interest in a trust which had not yet fallen in because one annuitant was still living. The trustee loaned the corpus to the charitable corporation in return for a sufficient amount of interest to pay the remaining annuity and the expenses of the trust. The government claimed that the trustee was subject to income tax on the income of the corpus of the trust but the court refused to reach this technical result, recognized that, nothwithsanding he legal existence of the trust, the charitable corporation in fact received the income, which in its hands was exempt from tax, and held that no tax was due from the trustee. It said:

> "To allow the technical formality of the trust, which does not prevent the Hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress."

In like manner here, to allow the technical formality of the trust, which does not prevent the beneficiaries from really suffering the loss on the sale of property, to defeat their right to the deduction, would be to defeat the express intent of Congress to permit individuals to deduct losses sustained by them.

(b) *There was in fact no trust of the residuary real estate so that the taxpayer was the legal, as well as beneficial owner of a one-fifth interest in the property sold.*

The questions discussed above arise only on the basis that the property sold was held in trust and are discussed first because both lower courts held that a trust must be implied.

The taxpayer maintains that the will of Richard T. Wilson, Sr., did not in fact create a trust of the residuary real estate. The five children therefore were vested with the legal title to such property, subject only to a power of sale in the executors. The loss sustained on the sale of their property was consequently deductible by them.

The structure of the will of Richard T. Wilson, Sr., clearly shows that the draftsman did not intend to create any trust of the residuary estate and the testator's intent is, of course, the determining factor in construing a will. *Colton* v. *Colton*, 127 U. S. 300, 309.

The will created trusts of $500,000 each for each of the five children, which were bequeathed to the Union Trust Company of New York as trustee, provided for increasing three of these express trusts by an additional $500,000 out of the residuary estate and gave the balance of the residuary estate (with which we are here concerned) to the five children absolutely. (Articles Third and Fourth of the will, R. 28-29). There was no devise or bequest of such property to the executors, as trustees or otherwise, there was no gift over of a remainder after life estates, there was merely an absolute gift of the proceeds of such property to the five children.

The absolute interest thus given to the children should not be cut down by implying a devise in trust to the executors as trustees, since there are no ex-

press words creating such a trust and no such trust results by clear and undoubted implication from other provisions of the will. *Freeman* v. *Coit*, 96 N. Y. 63, 68; *Beaver* v. *Beaver*, 117 N. Y. 421, 428; *Post* v. *Hover*, 33 N. Y. 593, 599.

The property which the testator desired to withhold from the immediate ownership and possession of the children through trusts was the property bequeathed in trust to the Union Trust Company of New York, which is referred to in Article Sixth of the will "as trustee of the trusts hereinbefore created" (R. 31, fol. 68) and in Article Ninth of the will "as trustee of the trusts under this will." (R. 32, fol. 70.) Article Sixth, furthermore, specifically provides the powers which such trustee shall have with respect to holding and making investments but the will is silent with respect to the character of any investments by the executors. Such a trust would be valid under Sections 96 and 97 of the Real Property Law of New York only if the trustee was empowered to receive the rents and profits, but the draftsman of the will gave no express power to the executors to receive the rents and profits of the residuary real estate.

The powers given to the executors to deal with the residuary estate pending its sale or distribution are not such as to require the conclusion that a trust of the residuary estate must be implied.

The testator recognized that his executors should be given ample time within which to make an advantageous sale of his residuary estate which would consist to a large extent of real estate and stocks in business corporations. He therefore directed the executors to "hold and manage" such residuary estate until it could be advantageously sold, gave them power to form a holding corporation if desirable,

directed them to sell and distribute the proceeds of sales among the five children, with discretion to retain such proceeds for further conversion before distribution and in the meantime to distribute the income "to the persons to whom my residuary estate is bequeathed."

Under the New York law a mandatory direction to executors to sell the property and distribute the proceeds does not create a trust, where no power to receive the rents and profits is given. *Matter of Callahan,* 96 Misc. 74, affirmed 176 App. Div. 906, affirmed 200 N. Y. 59.

The only provision of the New York Real Property Law under which such a trust of real estate could be valid would be subdivision 2 of Section 96 authorizing a trust "to sell, mortgage or lease real property for the benefit of annuitants or other legatees," but by Section 97 of the Real Property Law it is provided

> "A devise of real property to an executor or other trustee for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rent and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs or pass to the devisees of the testator, subject to the execution of the power."

The New York courts have construed these provisions as authorizing the existence of a trust only where the power to receive the rents and profits is one of the objects and purposes of the trust and not merely incidental to the main purpose of sale and distribution. In *Brooklyn Trust Company* v. *Kernan,* 108 Misc. 452, affirmed 191 App. Div. 895, the property was devised to the executors in trust to sell and convert into cash and distribute the proceeds and in

the meantime to take charge of the property and receive and distribute the rents. The court held that these provisions did not create a trust because no trust was intended, as the testator intended his beneficiaries to have the property without waiting for any contingency. The express power to collect the rents was regarded as merely incidental to the power of sale. The same result was reached as to the remainder estate considered in *Ray* v. *Fowler*, 200 App. Div. 155. See also *Heermans* v. *Burt*, 78 N. Y. 259; *Henderson* v. *Henderson*, 113 N. Y. 1.

In the case of *Morse* v. *Morse*, 85 N. Y. 53, upon which the District Court relied in holding that there was a trust of the residuary estate in this case (R. 44) the court found, under very similar testamentary provisions, that the creation of a trust of the residuary estate in that case was intended. But in that case the residue consisted largely of a single 150-acre farm which the legatees were seeking to partition with threatened destruction of values and the court concluded that this was the very thing which the testator intended to prevent. In the present case the residue consisted of a large amount of securities and numerous parcels of real estate in various localities. There is no question of the technical right to partition of real estate and the intention of the testator to avoid creating a trust of his residuary estate is clear. The judges in the *Kernan* case and *Ray* v. *Fowler* did not regard their decisions as contrary to *Morse* v. *Morse*. In the *Kernan* case the court said:

> "It may be that citations are of little value on this point for decisions seemingly quite at variance to those just referred to can be found. *Morse* v. *Morse*, 85 N. Y. 53; *Hubbard* v. *Houseley*, 43 App. Div. 129. As has been already stated the question in each case is one of intention."

The fact that the draftsman of the will limited the executors' power of sale to two lives in being is not significant as this limitation is not peculiar to trusts, but may apply, or at least might be thought to apply, to powers in trust. *Chaplin on Suspension of the Power of Alienation,* 3rd Ed. p. 244; see *Matter of Butterfield,* 133 N. Y. 473.

The power given to the executors in case the property was sold to retain the proceeds "for further conversion before distribution" can not be construed as an authority to the executors to retain and reinvest and hold proceeds received in a form suitable for distribution. This is clear from the fact that the will contains no provisions as to the making of investments by the executors. This power applied solely to cases such as the sale of real estate subject to a mortgage where it might be detrimental to their interests to attempt to distribute the mortgage among the five children.

All of the objects and purposes of the testator could be properly carried out through powers in trust. It is not necessary to imply a trust of the residuary estate contrary to his intention and repugnant to his absolute gift to his children.

There being no trust, but merely a power of sale in trust, legal title to the real estate vested in the five children at the death of Richard T. Wilson, Sr., Section 97, New York Real Property Law; *Brewster* v. *Gage,* 280 U. S. 327, and the loss on the sale of the Commercial Building is deductible by the five owners in equal shares.

II.

The taxpayer is at least entitled to deduct for 1922 a part of the loss on the sale of the Commercial Building proportionate to the part of the proceeds of such sale distributed to him in that year, as the Circuit Court of Appeals held.

The Circuit Court of Appeals adopted the practical view that the right to deduct the loss on the sale of the Commercial Building should follow the proceeds of the sale, that is, should remain with the executors to the extent that the proceeds were retained, but should be allowed to the beneficiaries to the extent that the proceeds were distributed to them during the year.

The court pointed out that if the property had been sold at a profit, the profit would be taxed to the executors if retained by them (Section 219 (a) (3) and 219 (c)) and to the beneficiaries if distributed to them (Section 219 (a) (4) and Section 219 (d)). Notwithstanding the discretionary power of the executors to retain the proceeds for further conversion, and the provisions of Article 342 of Regulations 62, it is clear that income, including capital gains, properly distributed would be taxable to the distributees. *Lehmann* v. *Commissioner,* 21 B. T. A. 664, 673; *Barton* v. *Commissioner,* 5 B. T. A. 1008, affirmed 26 F. (2d) 765; *Elizabeth F. Sprague,* 8 B. T. A. 173, *Willcuts* v. *Ordway,* 19 F. (2d) 917; *Crocker* v. *Nichols,* 27 F. (2d) 598.

To the extent that the proceeds were actually distributed, the court recognized that the capital resulting from the sale was the taxpayer's individual capital, which he had acquired at the testator's death (*Brewster* v. *Gage, supra*) and which by reason of the distribu-

tion was in his actual possession in 1922, and that the loss sustained with respect to such captial should be allowed as a deduction from the taxpayer's 1922 income just as the gain with respect to such capital if distributed would have been taxed to him.

This result is a logical conclusion from the reasoning of Judge A. N. Hand in his concurring opinion in *Merle-Smith* v. *Commissioner,* 42 Fed. 2d. 837. Judge Hand concurred in the view that the beneficiaries of the trust should be allowed depletion with respect to the trust properties, not because they had a direct interest in the corpus which would soon come into possession, but because the royalties which they received included capital to the extent of the depletion. Since the beneficiaries were receiving the full proceeds of the sale of part of the mineral, he held that they should receive the benefit of the deduction for the cost of the mineral sold. This would usually be less, but might be more, than the royalties. So in this case, to the extent that the beneficiaries received the proceeds of any sales, they should get the benefit of the capital investment applying against such sales. They would get such benefit where the property was sold at a profit since they would be taxed only on the profit and they should get the same treatment where the property was sold at a loss.

If the property had been distributed to the beneficiaries in kind and they had sold it at a loss, they would, of course, have been entitled to deduct as a loss the difference between the selling price and the value at date of acquisition, which was the value at the date of the testator's death. (*Brewster* v. *Gage, supra; Estate of Frances Abeles,* 24 B. T. A. 435; *Marian B. Pringle,* 26 B. T. A. 362.) Why should not the same result follow where the executors sell and distribute the proceeds, at least in proportion to the

proceeds distributed? It certainly makes no practical difference whether the sale is made by the executors and the proceeds distributed, or the property is distributed and sold by the beneficiaries. The loss is just as real and just as personal to the beneficiaries in the one case as in the other.

This principle clearly applies to trusts such as the one at bar where the beneficiaries own every interest in the property, and are entitled not only to current income, but also to distributions of corpus. In such cases, there can be no objection to recognizing the complete ownership of trust property by the beneficiary and the loss actually sustained by him, at least to the extent that the property or its proceeds actually comes into his possession during the taxable year.

CONCLUSION.

The decision of the Circuit Court of Appeals should be reversed and the decision of the District Court affirmed. In the alternative, the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

GEORGE E. CLEARY,
CLARK T. BROWN,
Counsel for Respondents in No. 460 and for Petitioners in No. 461.

APPENDIX.

Section 214 of the Revenue Act of 1921, 42 Stat. 239, provides:

> "Sec. 214. (a) That in computing net income there shall be allowed as deductions:
>
> * * * * * *
>
> (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business;
>
> (5) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the trade or business; * * *."

Section 219, Revenue Act of 1921, 42 Stat. 246, provides:

> "Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—
>
> (1) Income received by estates of deceased persons during the period of administration or settlement of the estate;
>
> (2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;
>
> (3) Income held for future distribution under the terms of the will or trust; and
>
> (4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.
>
> (b) The fiduciary shall be responsible for making the return of income for the estate or trust

for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, * * *. In cases in which there is any income of the class described in paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in

computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

(e) In the case of an estate or trust the income of which consists both of income of the class described in paragraph (4) of subdivision (a) of this section and other income, the net income of the estate or trust shall be computed and a return thereof made by the fiduciary in accordance with subdivision (b) and the tax shall be imposed, and shall be paid by the fiduciary in accordance with subdivision (c), except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in paragraph (4) of subdivision (a) which, pursuant to the instrument or order governing the distribution, is distributable during its taxable year to the beneficiaries. In cases under this subdivision there shall be included, as provided in subdivision (d) of this section, in computing the net income of each beneficiary, that part of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable during the taxable year to such beneficiary."

Section 96 of the New York Real Property Law provides:

"*Purposes for which express trusts may be created.* An express trust may be created for one or more of the following purposes:

1. To sell real property for the benefit of creditors;

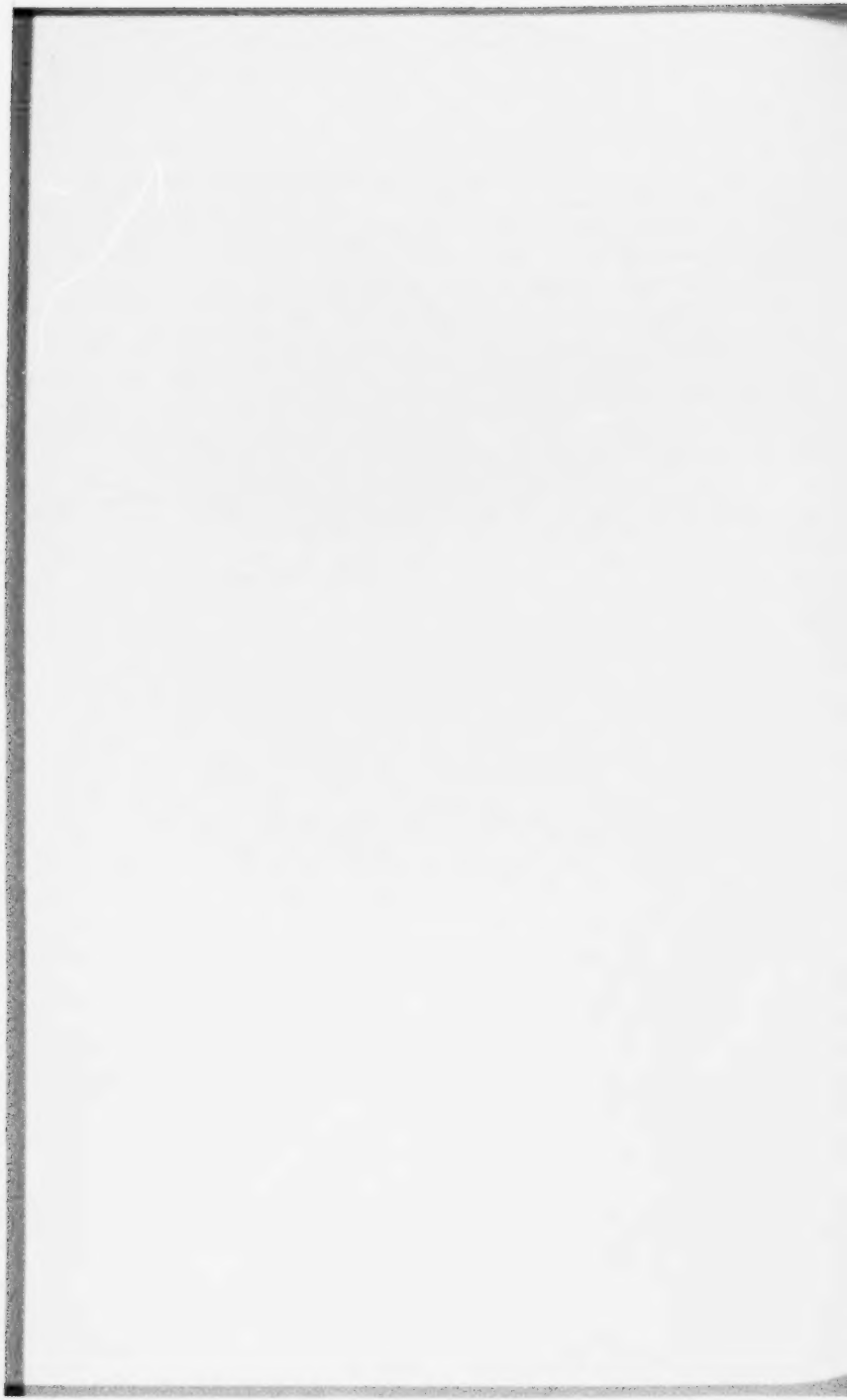
2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

3. To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person or for any shorter term, subject to the provisions of law relating thereto;

4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law."

Section 97 of the New York Real Property Law provides:

"*Certain devises to be deemed powers.* A devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power."



FILE COPY

FILED
OCT 18 19
CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 461

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEM G. RUBERT, as Executors of the Estate of Richard T. Wilson, Jr., Deceased
Petitioners (on Cross-Petition)

against

CHARLES W. ANDERSON, Collector of Internal Revenue for the Third District of New York
Respondent (on Cross-Petition)

Cross-Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof

---

GEORGE E. CLEARY
CLARK T. BROWN
Attorneys for Petitioners on Cross-Petition

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. .

MARIAN STEEDMAN WILSON, ROBERT GOELET and HARLEM G. RUBERT, as Executors of the Estate of RICHARD T. WILSON, JR., deceased,

Petitioners (on Cross-Petition),

against

CHARLES W. ANDERSON, Collector of Internal Revenue for the Third District of New York,

Respondent (on Cross-Petition).

Cross-Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, and Brief in Support Thereof.

Petition.

The Solicitor General of the United States, on behalf of the Collector of Internal Revenue, has filed a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the judgment of that Court entered July 18, 1932. The petitioners on

this cross-petition pray that, if a writ of certiorari be granted on the petition of the Solicitor General, a writ of certiorari likewise be granted on this cross-petition in order that the entire case may be reviewed by this Court. If a writ of certiorari is denied on the petition of the Solicitor General, these petitioners do not pray that a writ of certiorari be granted on this cross-petition.

Summary Statement of the Matter Involved.

This Federal income tax case involves the right of Richard T. Wilson, Jr., now deceased (referred to herein as the "taxpayer"), to deduct from his 1922 income a loss of $22,660. The amount of $22,660 was one-fifth of the loss on the sale in 1922 of certain real estate in which the taxpayer and his four brothers and sisters had inherited equal interests under the will of their father, Richard T. Wilson, Sr., who died in 1910, a resident of New York.

We contend, first, that under this will the real estate in question, which was part of the residuary estate, was devised directly to the five children of the testator and that the loss on the sale of the real estate was therefore sustained by the children and was deductible by them. The Collector contends that the will created a trust with respect to the residuary estate, with the executors as trustees, and that the loss on the sale of the real estate was deductible only by the executors as trustees and not by the beneficiaries.

We contend, second, that even if a trust was created, the beneficiaries were entitled to deduct the loss on the sale of the real estate in such trust because of their direct, entire and exclusive ownership of every present and future interest in the trust property.

The will did not by express terms create any trust with respect to the residuary estate. The will did create several

express trusts, all of which had been established prior to 1913, some nine years before the taxable year 1922. The residuary estate was disposed of by Article Fourth of the will, which provided as follows:

> "All the rest, residue and remainder of my property, * * * I direct my Executors hereinafter named to sell and convert into personalty, and to divide the proceeds thereof into five equal parts which I give and bequeath as follows:
>
> "(1) To my son Marshall Orme Wilson, one of such parts to be his absolutely.
>
> "(2) To my daughter Mary R. Goelet, one of such parts to be hers absolutely.
>
> "(3) One of such parts to the amount of Five hundred thousand dollars I direct to be added to the trust fund of Five hundred thousand dollars created in and by the foregoing Third Article of this will for the benefit of my son Richard T. Wilson, Jr. * * * *and the balance of such part I give and bequeath to my said son Richard T. Wilson, Jr. to be his absolutely.*" (Italics supplied.) (R. 36-37.)

Sub-paragraphs (4) and (5) of Article Fourth made provisions for two other children identical with those of sub-paragraph (3) for the taxpayer.

The real estate sold in 1922 was not used in the cases of three of the children, to increase the express trusts created by Article Third. It was part of the balance of the residuary estate which passed to the five children to be theirs absolutely. No one else had any interest in this property or the income from it or the proceeds of its sale.

The will directed the executors to sell the remaining residuary estate and to distribute the proceeds unless such distribution was deemed detrimental to the interests of the

testator's children, or, in their discretion to retain the proceeds for further conversion, not, however, beyond the period of the lives of two of the sons. The will also directed the executors to hold and manage the residuary estate until in their judgment it could be advantageously disposed of, but not longer than the two specified lives. The will directed the executors to distribute the income from the property in the residuary estate to the children semi-annually (R. 39-41).

The District Court for the Southern District of New York decided, contrary to our contentions, that under the will of Richard T. Wilson, Sr., a trust of the residuary property must be implied because of the above provisions as to management and discretionary retention of proceeds of sale by the executors, but sustained our contention that any trust so created was a trust with respect to which the beneficiaries had such a complete and direct ownership of the corpus that they were entitled to deduct from their income the loss on the sale of the trust real estate (R. 99-99).

The Circuit Court of Appeals for the Second Circuit also decided that the will created a trust. The Circuit Court of Appeals, however, decided that the taxpayer was entitled to deduct only a part of his share of the loss on the sale of the real estate in the residuary estate, the amount of the deductible loss to be determined by the proportion which the amount of the proceeds of the sale distributed to the children in 1922 bore to the entire proceeds of the sale. The Circuit Court of Appeals noted that if the property had been sold at a profit the portion of the profit distributed to the children would have been taxable to them individually and the portion of the profit retained by the executors would have been taxable to the executors. The Court held it followed that the loss should be deductible by the children individually in proportion to the amount of the proceeds of the sale distributed to them in 1922.

The Circuit Court of Appeals reversed the judgment and remanded the case to the District Court for a new trial to determine the amount of the loss deductible from the taxpayer's income. No new trial has been had and the amount of the loss to be deducted under the decision of the Circuit Court of Appeals has not been determined.

Questions Presented.

1. Did the will of Richard T. Wilson, Sr., create a trust with respect to his residuary estate remaining after establishing the trusts expressly provided for?

(If it is decided that the will did not create a trust with respect to such property, it becomes unnecessary to decide the remaining questions as it must then be conceded by the Collector that the real estate descended immediately to the heirs, *Brewster* v. *Gage*, 280 U. S. 327, and the loss on the sale of the property was their loss and deductible by them.)

2. If the will of Richard T. Wilson, Sr., did create a trust with respect to his remaining residuary estate, was it a trust in which the beneficiaries, by reason of their direct, entire and exclusive ownership of the corpus, were entitled to deduct from their income a loss on the sale of part of the corpus?

3. If the will of Richard T. Wilson, Sr., did create a trust with respect to the remaining residuary estate, is the deduction by the beneficiaries of the loss on the sale of the trust real estate to be limited by the proportion which the amount of the proceeds of the sale distributed to the beneficiaries in 1922 bore to the entire proceeds of the sale?

Specification of Errors to be Urged.

1. The Circuit Court of Appeals erred in holding that the will of Richard T. Wilson, Sr., created a trust with respect to his remaining residuary estate.

2. The Circuit Court of Appeals erred in not holding that, even though a trust was created with respect to the remaining residuary estate, the taxpayer was entitled to deduct from his income his full share of the loss on the sale of the Commercial Building.

3. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

Reasons for Granting the Writ.

As stated above, these petitioners pray that a writ of certiorari be granted on this cross-petition only in the event that the writ of certiorari is granted on the petition of the Solicitor General.

The petitioners do not believe that the case is of sufficient general importance to be heard by the Supreme Court. It involves at the outset the construction of a particular will. There is no conflict of decisions in the Circuit Courts of Appeals. The case does not fall within the other usual reasons for granting a writ of certiorari.

However, if a writ of certiorari is to be granted, the entire case should be presented to the Court. The petition of the Solicitor General on behalf of the Collector will present to the Court only the contention that the Circuit Court of Appeals erred in holding that the taxpayer was entitled to deduct a portion of the loss determined by the proportion which the amount of the proceeds of the sale distributed to the beneficiaries in the taxable year bore to the entire proceeds of the sale.

If the case is to be heard by this Court there should be presented the primary question of whether or not any trust of the remaining residuary estate was created by the will of Richard T. Wilson, Sr., because if no such trust was created the questions raised by the petition of the Solicitor General do not arise. Likewise, the case should be presented to the Court in such a manner that the Court may determine whether the taxpayer was entitled to a partial deduction, as determined by the Circuit Court of Appeals, or whether he was entitled to the entire deduction, as determined by the District Court.

WHEREFORE, it is respectfully submitted that, if a writ of certiorari is granted on the petition of the Solicitor General, a writ of certiorari likewise be granted on this cross-petition.

Respectfully submitted,

MARIAN STEEDMAN WILSON,
ROBERT GOELET and
HARLEM G. RUBERT,
As Executors of the Estate of
Richard T. Wilson, Jr., deceased,
Petitioners (on Cross-Petition).

GEORGE E. CLEARY,
CLARK T. BROWN,
Attorneys for Petitioners (on Cross-Petition).

BRIEF IN SUPPORT OF CROSS-PETITION.

Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 90-99) is reported in 51 F. (2d) 268. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 60 F. (2d) 52.

Jurisdiction.

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented and Statement of the Case.

The statement of the questions presented and the statement of the case will be found in the petition.

Argument.

As stated in the cross-petition, we do not believe this case is one in which a writ of certiorari should be granted. However, if a writ is to be granted on the petition of the Solicitor General, it should also be granted on the cross-petition in order to present the entire case to the Court, and bring up for consideration the following contentions of the petitioners on the cross-petition.

We maintain that the will of Richard T. Wilson, Sr., did not create a trust with respect to the remaining residuary estate, and that the Circuit Court of Appeals erred in holding that such a trust was created. The plan of the will was to create trusts for each of the five children, of $500,000 each, with the Union Trust Company of New York as Trustee, to increase three of these trusts to $1,000,000 each, and

to give the remaining residuary estate (with which we are here concerned) to the five children absolutely (R. 36-37).

The significant features of this will indicating that no trust of the residuary real estate was created are, *first*, the balance of the residuary estate is left absolutely and exclusively to the five children; *second*, there is no devise of the residuary real estate to the executors in trust or to anyone other than the five children; *third*, no intention is indicated to create a trust or to withhold the enjoyment of the balance of the residuary estate from the children except for the purpose of awaiting an advantageous market; *fourth*, such trusts as the testator intended should be set up are expressly provided for, with the Union Trust Company as Trustee with specific powers as to reinvestment of proceeds of sale; *fifth*, no express power to receive rents and profits is given the executors as required for a valid trust to sell by Section 97 of the Real Property Law of New York, nor is the distribution of rents and profits to each child limited to his life or a shorter period as required by Section 96.3 of such law; *sixth*, the full purpose of the testator could be accomplished by construing the will as vesting in the executors merely a power in trust to sell.

Obviously, the testator intended that the balance of the residuary estate should be divided among his children as soon as practicable. This was his purpose and his intent. The testator did not *intend* to create any trusts of the residuary real estate, and on this question the testator's intent is the determining factor. *Green* v. *Green*, 23 Wall. 486, 490 (1874).

If our contention that the will did not create a trust with respect to the remaining residuary estate is correct, then the real estate, of course, descended immediately to the children on the death of the testator, *Brewster* v. *Gage*, 280

U. S. 327, and the loss sustained on the sale of the real estate was their loss and deductible by them from their income, and the questions raised by the petition of the Solicitor-General do not arise.

Even if a technical trust was created with respect to the remaining residuary estate, as the Circuit Court of Appeals held, we submit that such Court erred in refusing to hold that it was a trust with respect to which the beneficiaries were entitled to deduct from their own income losses sustained on the sale of the trust corpus. This was the holding of the District Court. The outstanding fact is that the five beneficiaries of the trust had every present and future interest in the trust property and its income. There were no remaindermen; no adverse interests; the children's ownership was complete and exclusive. They were entitled, not only to the current income, but to the corpus and to the proceeds of sales of the property as rapidly as practicable. By 1922 practically all of the original corpus had been distributed.

The case is radically different from that of a trust in which a beneficiary has only a life interest in the income. In such a case it may well be that the beneficiary is not concerned with a loss on the sale of trust assets, except in so far as such loss may be subsequently reflected in diminution of income. (Compare *Baltzell* v. *Mitchell*, 3 F. [2d] 428, certiorari denied 268 U. S. 690.) In the case of a trust, however, in which the beneficiaries are entitled, not only to the current income but to the corpus, and their possession of the corpus is postponed only for the purpose of converting the property into a distributable form, it is obvious that a loss of the corpus is in fact the loss of the beneficiaries.

Our contention that the children were entitled to deduct the losses on the sale of the property even though a trust was technically created, is sustained by the decision of the

Circuit Court of Appeals for the Second Circuit in *Merle-Smith* v. *Commissioner*, 42 F. (2d) 837 (certiorari denied, 282 U. S. 897); by decisions of the Board of Tax Appeals in *Munger* v. *Commissioner*, 16 B. T. A. 168; *Francis, Guardian, et al.* v. *Commissioner*, 15 B. T. A. 1332; and by the decision of the Court of Appeals of New York in *People, ex rel. Field* v. *Gilchrist*, 240 N. Y. 301.

In any event, we submit, the Collector was not prejudiced by the decision of the Circuit Court of Appeals that the taxpayer was entitled to deduct a portion of the loss on the sale of the real estate in the residuary estate, determined by the proportion which the amount of the proceeds of the sale distributed in the taxable year bore to the total proceeds of the sale. Under Sections 219 (a) (4) and 219 (c) of the Revenue Act of 1921, if such trust property had been sold at a profit and part of the profit retained by the trustees and part distributed, the amount of the profit retained would be taxed to the trustees and the amount distributed would be taxed to the beneficiaries. *Appeal of Scripps*, 1 B. T. A. 491; *Barton* v. *Commissioner*, 5 B. T. A. 1008; *Appeal of Sprague*, 8 B. T. A. 173. Where the trust property is sold at a loss, it logically follows that the beneficiaries are entitled to deduct at least that part of the loss proportionate to the part of the proceeds distributed to them within the year. While, as contended above, we believe the entire loss was deductible by the children, we submit that the children were at least entitled to deduct the loss on the same basis that a profit would have been taxed to them.

It is therefore submitted that if a writ of certiorari is granted on the petition of the Solicitor General, a writ should likewise be granted on the cross-petition.

Respectfully submitted,

GEORGE E. CLEARY,
CLARK T. BROWN,
Attorneys for Petitioners (on Cross-Petition).

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 461

MARIAN STEEDMAN WILSON, ROBERT GOELET, AND Harlem G. Rubert, as Executors of the Estate of Richard T. Wilson, Deceased, petitioners

v.

CHARLES W. ANDERSON, COLLECTOR OF INTERNAL Revenue for the Third District of New York

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the petition in this case, if the petition is granted in No. 460.

In No. 460 the present respondent filed a petition for certiorari in this case to review the decision of the court below in so far as it held that part of a loss sustained by the Richard T. Wilson, sr., Trust upon the sale of real estate constituting a part of the corpus, was deductible in the income tax return of Richard T. Wilson, jr., one of the beneficiaries, for the year 1922.

145696—32

In the instant petition the petitioners contend that the court below incorrectly held that the will of Richard T. Wilson, sr., created trusts of his residuary estate for the benefit of Richard T. Wilson, jr., and others, and also that it erred in holding that only so much of the loss sustained upon the sale was deductible by the beneficiaries in 1922 as is the ratio of the amount of the proceeds distributed to the beneficiaries in 1922 to the entire proceeds of the sale.

The questions raised in the instant petition are so closely related to those presented in No. 460, that we believe it will be helpful to the Court and desirable from the point of view of the parties, that the Court take jurisdiction of the entire controversy if it is to consider any part of it. The petitioners do not seek to have this petition granted if the petition in No. 460 is denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

NOVEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932

SUPREME COURT OF THE UNITED STATES.

Nos. 460 and 461.—October Term, 1932.

Charles W. Anderson, Collector of Internal Revenue for the Third District of New York, Petitioner,
460 *vs.*
Marian Stedman Wilson and others, as Executors of the Estate of Richard T. Wilson, Jr., Deceased, Respondents.

Marian Stedman Wilson and others, as Executors of the Estate of Richard T. Wilson, Jr., Deceased, Petitioners,
461 *vs.*
Charles W. Anderson, Collector of Internal Revenue for the Third District of New York, Respondent.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 13, 1933.]

Mr. Justice Cardozo delivered the opinion of the Court.

The question to be decided is whether the difference between the value of real estate at the death of a testator and the proceeds realized thereafter upon a sale by the trustees may be deducted as a loss by the taxpayer, the beneficial owner of the proceeds, upon his return to the collector for the income of the year.

Richard T. Wilson, Sr., a resident of New York, died in November, 1910, the owner of a large estate. By the fourth article of his will he directed his executors to sell and convert into personalty his entire residuary estate, and to divide the proceeds thereof into five equal parts. Out of the fifth part set aside for the use of his son, Richard T. Wilson, Jr., the sum of $500,000 was to be held for the use of the son during life with remainder to lineal descendants, and in default of such descendants to others. "The

balance of such part I give to my said son, Richard T. Wilson, Jr., to be his absolutely."

This gift, if it had stood alone, might have seemed to allow to the executors no discretion as to the time of sale, and might have bred uncertainty as to their powers and duties before the time for distribution. The next or fifth article clarifies the meaning. The testator there recalls the fact that after setting up the trust for $500,000 and other special funds, a large part of his residuary estate will consist of real estate in New York and other states, and shares of manufacturing and business corporations, "which should not be sold excepting under favorable conditions." Accordingly he lays upon his executors the following command: "to hold and manage such remaining portion of my residuary estate until in their judgment it can from time to time be advantageously sold and disposed of, not exceeding, however, a period longer than the lives of my sons Marshall Orme Wilson and Richard T. Wilson, Jr., and the survivor of them, and I hereby authorize and empower my said executors within said period to sell, convey, assign and transfer the same, or any part thereof, at such time or times as they may deem for the best interests of my estate, and upon such terms and conditions as they may deem proper, including the terms and mode of payment thereof." Nor is this all. The executors are authorized in their discretion to organize a corporation, to convey to it the whole or any part of the residuary estate in return for the capital stock, and to hold the stock "until it can in their judgment be advantageously disposed of." Finally there is a provision that upon the making of a sale, the executors in their discretion may distribute the proceeds, "or retain the same, or any part thereof for further conversion before distribution, not, however, beyond the period of the lives of my said sons and the survivor of them." Until the time of distribution the net income is to be paid semi-annually to those entitled to receive it.

Included in the real estate at the death of the testator was a building in the City of New York known as the "Commercial Building," of a value at that time of $290,000. This building the executors held till 1922, when they sold it for $165,000. After allowance for depreciation, the loss to the estate by reason of this sale was $113,300. The executors were at liberty to distribute the entire proceeds ($165,000) among the residuary legatees if their judgment moved them to that course. They did not do so.

They distributed only $50,000, and held the balance in the trust. One fifth of the part distributed belonged and was paid to Richard T. Wilson, Jr. One fifth of the part retained was held for his use as it had been before the sale.

The present controversy grows out of a tax return of income for 1922. From the gross income of that year the taxpayer, Richard T. Wilson, Jr., deducted $25,001.17, one-fifth, according to his computation, of the loss resulting from the sale. It was afterwards agreed that one-fifth of the loss was not more than $22,660, and that the amount of the claimed deduction should be corrected accordingly. The Commissioner disallowed the loss altogether, and assessed an additional tax. The taxpayer upon payment of the tax filed a claim for refund which the Commissioner rejected. This suit was then brought to recover the amount paid upon the additional assessment. During the pendency of the suit the taxpayer died, and his executors were substituted. The District Court gave judgment in their favor, holding that one-fifth of the loss upon the sale of the Commercial Building was a loss suffered by the taxpayer, the beneficiary of the trust, and was a proper deduction from his income for the year of sale. Upon an appeal by the Government, the Court of Appeals for the Second Circuit sustained the representatives of the taxpayer in their claim for a deduction, but reduced the amount. In the view of that court the loss allowable to the beneficiary was not one-fifth of the entire loss that had been suffered by the trust estate, but only that part of one-fifth of the total loss represented by the ratio between the part of the proceeds presently distributed (not more than $50,000) and $165,000, the entire proceeds of the sale. The record left room for some uncertainty whether the payment of $50,000 had been derived altogether from a sale of the Commercial Building, or in part from other sources. To the end that this uncertainty might be removed, the judgment of the District Court was reversed, and the cause remanded for retrial in accordance with the opinion. 60 F. (2d) 52. Cross-petitions for certiorari, allowed by this court, have brought the controversy here. In No. 460, the Government complains that there was error in the refusal to disallow the deduction altogether. In No. 461, the representatives of the taxpayer complain that there was error to their prejudice in restricting the amount.

To determine whether the loss was one suffered by the trust estate, or one suffered by the taxpayer to whom the proceeds of the sale were payable, there is need at the outset to determine the meaning of the will. The Government contends, and so the courts below have held, that title to the realty was given to the executors upon a valid trust to sell and to apply the rents and profits in the interval. The representatives of the taxpayer contend that the executors had no title, but only a power in trust, and that subject to the execution of that power, the taxpayer was owner. If that be so, the loss was his and no one else's. A mere donee of a power is not the owner of an estate, nor to be classed as a juristic entity to which a loss can be attributed. We think, however, that what passed to the executors was ownership or title. True the will does not say in so many words that the residuary estate is given or devised to them, but the absence of such words is of no controlling significance when a gift or devise is the appropriate and normal medium for the attainment of purposes explicitly declared. *Robert* v. *Corning*, 89 N. Y. 225, 237; *Vernon* v. *Vernon*, 53 N. Y. 351, 359; *Tobias* v. *Ketcham*, 32 N. Y. 319; *Brewster* v. *Striker*, 2 N. Y. 19. Nothing less than ownership will supply that medium here. The executors are charged with active and continuing duties not susceptible of fulfilment without possession and dominion. They are to collect the income and pay it over in semi-annual instalments after deducting the expenses. They are to "hold and manage" the estate with full discretionary powers. They are even at liberty to convey it to a corporation if they believe that efficient administration will thereby be promoted. Under reiterated judgments of the highest court of New York they are more than the donees of a power. They are the repositories of title. *Morse* v. *Morse*, 85 N. Y. 53; *Robert* v. *Corning, supra; Ward* v. *Ward*, 105 N. Y. 68; *Mee* v. *Gordon*, 187 N. Y. 400; *Putnam* v. *Lincoln Safe Deposit Co.*, 191 N. Y. 166, 182; *Striker* v. *Daly*, 223 N. Y. 468, 472.

Another question of construction has yet to be considered. We have seen that the effect of the will was to clothe the executors with title to the land. We have yet to determine whether the title that came to them was the fee or something less. If it was the fee, the whole estate was in them, and no one else had any ownership or interest in the land as distinguished from ownership or interest in the proceeds of a sale. *Delafield* v. *Barlow*, 107 N. Y.

535; *Salisbury* v. *Slade*, 160 N. Y. 278, 290; *Weintraub* v. *Siegel*, 133 App. Div. (N. Y.) 677, 681. If it was less than the fee, there may have vested in others upon the death of the testator a future estate in remainder, which would take effect in possession on the termination of the trust. *Losey* v. *Stanley*, 147 N. Y. 560, 568; *Stevenson* v. *Lesley*, 70 N. Y. 512; *Matter of Easterly*, 202 N. Y. 466, 474. Under the law of New York what passed to these executors was the title to the fee. By the will of this testator all his property, real and personal (with exceptions not now material) was to be converted into money. The five sons and daughters among whom the money was to be divided had no interest in the land, aside from a right in equity to compel the performance of the trust. Real Property Law of New York, § 100; *Schenck* v. *Barnes*, 156 N. Y. 316, 321; *Melenky* v. *Melen*, 233 N. Y. 19, 23. What was given to them was the money forthcoming from a sale. *Delafield* v. *Barlow*, *Salisbury* v. *Slade*, *Weintraub* v. *Siegel*, *supra*. Their interest in the corpus was that and nothing more.

Our answer to the inquiry as to the meaning of the will comes close to being an answer to the inquiry as to the incidence of the loss. The taxpayer has received the only legacy bequeathed to him, and received it as it was given without the abatement of a dollar. What was bequeathed was an interest in a fund to be made up when the trustees were of opinion that it would be advisable to sell. This alone was given, and this has been received. There has been no loss by the taxpayer of anything that belonged to him before the hour of the sale, for nothing was ever his until the sale had been made and the fund thereby created. A shrinkage of values between the creation of the power of sale and its discretionary exercise is a loss to the trust, which may be allowable as a deduction upon a return by the trustees. It is not a loss to a legatee who has received his legacy in full. One might as well say that a legatee of shares of stock to be bought by executors out of the moneys of the estate would have an allowance of a loss upon a showing that the value would have been greater if the executors in the exercise of their discretion had bought sooner than they did. The legatee must take the legacy as the testator has bequeathed it.

We hold that the trust, and not the taxpayer, has suffered the loss resulting from the sale of the Commercial Building, and it follows that where loss has not been suffered, there is none to be

allowed. Whether the result would be the same if the beneficiaries had been the owner of future estates in remainder, we are not required to determine. Cf. *Francis* v. *Commissioner*, 15 B. T. A. 1332, 1340. Our ruling will be kept within the limits of the case before us. In so ruling we do not forget that the trust is an abstraction, and that the economic pinch is felt by men of flesh and blood. Even so, the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions. The Revenue Act of 1921 under which the tax in question was imposed defines the word "taxpayer" as including a trust or an estate. Revenue Act of 1921, c. 136; 42 Stat. 227, sec. 2 (9). The definition is pursued to its logical conclusion in a long series of decisions. *Baltzell* v. *Mitchell*, 3 F. (2d) 428; *Whitcomb* v. *Blair*, 25 F. (2d) 528; *Abell* v. *Tait*, 30 F. (2d) 54; *Busch* v. *Commissioner*, 50 F. (2d) 800, 801; *Roxburghe* v. *Burnet*, 58 F. (2d) 693; cf. *Merchants Loan & Trust Co.* v. *Smietanka*, 255 U. S. 509. These and other cases bear witness to the rule that an equitable life tenant may not receive a deduction for the loss of capital assets of the trust, though the result of such a loss is a reduction of his income. The argument will not hold that what was lost to this taxpayer was not the capital of the trust, but rather his own capital, withdrawn from his possession, but held for his account by the executors as custodians or bailiffs. His capital was in the proceeds, to the extent that they were distributed, and never in the land. We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it.

The Circuit Court of Appeals did not err in reversing the judgment of the District Court. It did err in its instructions as to the relief upon a second trial.

The judgment of reversal is accordingly affirmed, and the cause remanded to the District Court with instructions that a judgment should be entered dismissing the complaint.